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# The Competitor's Dilemma Tailoring Antitrust Sanctions to White-Collar Priorities in the Fight against Cartels

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NOTE

# THE COMPETITOR'S DILEMMA: TAILORING ANTITRUST SANCTIONS TO WHITE-COLLAR PRIORITIES IN THE FIGHT AGAINST CARTELS

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## *INTRODUCTION*

*"[A]s long as you are only talking about the money, the company can at the end of the day take care of me—but once you begin talking about taking away my liberty, there is nothing the company can do for me."*

This admission, made by a senior corporate executive who would ultimately serve as CEO of one of America's largest companies, exemplifies the attitude of many white-collar defendants when they are threatened with criminal sanctions such as fines and incarceration.[1] In attempting to deter various forms of corporate crime, the US Department of Justice ("DOJ") has thus made clear that white-collar defendants can face incarceration, on top of traditional fines, if they are caught engaging in such crimes.[2] This Note addresses one type of white-collar crime in particular: the formation of anti-competitive cartels.

A cartel is an agreement among competitors to fix prices, restrict output, allocate customers or markets, or rig bids, often

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1. Donald I. Baker, *Why Is the United States So Different from the Rest of the World in Imposing Serious Criminal Sanctions on Individual Cartel Participants?*, 12 SEDONA CONF. J. 301, 306 (2011) (quoting anonymous friend of the author, a "senior corporate executive who would go on to become CEO of one of America's largest enterprises").

2. *See id.* at 305–06 (explaining the Department of Justice's ("DOJ") emphasis on incarceration of individual cartelists, which is based on the belief that incarceration is the most effective deterrent for white-collar executives); Gregory C. Shaffer & Nathaniel H. Nesbitt, *Criminalizing Cartels: A Global Trend?*, 12 SEDONA CONF. J. 313, 325 (2011) (describing the DOJ's emphasis on individual accountability for corporate crimes, particularly cartel participation).

in the hope of obtaining the advantages of a monopoly.[3] During the past two decades, competition authorities around the world have undergone a "major transformation" in their approaches to international cartels.[4] While the DOJ's Antitrust Division ("Antitrust Division" or "Division") spearheaded the prosecutorial focus on international cartels in the 1990s, jurisdictions outside of the United States have since joined this pursuit.[5] The EU Competition Commission, which prosecutes cartels under Article 101 of the Treaty on the Functioning of the European Union, has already imposed more than US$15 billion in corporate fines for cartel behavior.[6]

Some competition authorities, while still heavily fining corporations, have also sanctioned those corporations' executives and employees for their involvement in detected

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3. *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 802 (1993) (characterizing a cartel as a "concerted agreement to terms" among competitors); 58 C.J.S. *Monopolies* § 3 (2010) (giving a brief overview of antitrust laws and policies, specifically cartels); Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443, 450–51 (2006) (explaining that cartels are "'naked' restraints on competition, involv[ing] an agreement among competitors to fix prices, restrict output, allocate customers or markets, or rig bids" (citations omitted)); Gianluca Morello, Note, *Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multi-Discipline Practices Should Be Permitted in the United States*, 21 FORDHAM INT'L L.J. 190, 240 n.308 (1997) (citing WILLIAM J. BAUMOL & ALAN S. BLINDER, ECONOMICS, PRINCIPAL AND POLICY: MICROECONOMICS 235 (4th ed. 1988)) (defining cartels).

4. *See* Margaret C. Levenstein & Valerie Y. Suslow, *Breaking Up Is Hard to Do: Determinants of Cartel Duration*, 54 J.L. & ECON. 455, 455 (2011) (describing the evolution of competition agencies' policies toward cartels); David C. Gustman, *Antitrust Beyond Borders: Some Concluding Thoughts on the Globalization of Antitrust*, 14 LOY. CONSUMER L. REV. 605, 607 (2002) (explaining that antitrust enforcement agencies around the world have duplicated the United States' emphasis on prosecuting hard-core cartels).

5. *See* Shaffer & Nesbitt, *supra* note 2, at 324 (describing the development of cartel enforcement in the United States); John Pheasant, *Interaction Between Public and Private Enforcement*, 4 COMPETITION L. INT'L 36, 36 (2008) (examining competition agencies' recent policies and accompanying legal rules that have significantly increased the sanctions for cartel violators).

6. *See* JEFFREY L. KESSLER & SPENCER WEBER WALLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW § 5:16 (2d ed. 2007) (comparing Section 1 of the Sherman Act with Article 101 of the Treaty on the Functioning of the European Union, both of which prohibit certain types of collusion among competitors); John M. Connor, *Cartels & Antitrust Portrayed: Private International Cartels from 1990 to 2008*, at 55 (Am. Antitrust Inst., Working Paper No. 09-06, 2009), *available at* http://www.antitrustinstitute.org/sites/default/files/Working%20Paper%2009-06_090120091450.pdf (providing statistics and charts with information regarding increasing jail sentences levied against cartelists in the United States).

cartels.[7] In the United States, the prevailing belief is that it is the corporation's executives or employees that actually decide to form a cartel, and thus effective cartel deterrence must also sanction these influential actors.[8] Corporate fines, though indirectly deterring these actors through termination or derivative suits, more directly threaten the shareholders, who may have been powerless to stop cartel participation in the first place.[9]

Incarceration is widely considered the strongest deterrent to individuals contemplating cartel participation.[10] Thus, the Antitrust Division has focused increasingly on incarcerating individual cartelists, and it is particularly proud of that focus.[11]

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7. *See* Pheasant, *supra* note 5, at 36 (describing the United States' history of significant sanctions for both corporate and individual cartelists, with the EU Competition Commission and other antitrust authorities more recently following suit); Scott D. Hammond, Deputy Assistant Att'y Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program 2–10 (Mar. 26, 2008), *available at* http://www.justice.gov/atr/public/speeches/232716.pdf (providing numerous statistics on the increase of incarceration rates and levels in cases involving cartel behavior).

8. *See* Hammond, *supra* note 7, at 2; Pheasant, *supra* note 5, at 37.

9. *See* John M. Connor & Robert H. Lande, *Cartels As Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 444–45 (2012) ("The resulting fines would be unfair to stockholders and cause over-investment in collusion prevention (although the actual costs of compliance programs are likely to be very small)."); Andreas Stephan, *Disqualification Orders for Directors Involved in Cartels*, 2 J. EUR. COMPETITION L. & PRAC. 529, 535 (2011) ("Corporate fines (however high they may be) largely punish the wrong people."); Harlan M. Blake, *The Shareholders' Role in Antitrust Enforcement*, 110 U. PA. L. REV. 143, 143 (1961) (introducing the question of whether "shareholders' derivative actions are available as a means of preventing a course of corporate conduct which runs a serious risk of incurring antitrust penalties").

10. *See* Gregory J. Werden, Scott D. Hammond & Belinda A. Barnett, *Detection and Deterrence of Cartels: Using All the Tools and Sanctions*, 56 ANTITRUST BULL. 207, 216 (2011) (arguing that incarceration's deterrent effect is more "potent" than monetary sanctions); Thomas O. Barnett, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Criminal Enforcement of Antitrust Laws: The U.S. Model 3 (Sept. 14, 2006) [hereinafter Barnett, Criminal Enforcement], *available at* http://www.justice.gov/atr/public/speeches/218336.pdf (emphasizing that "nothing is a greater deterrent" for executives than incarceration).

11. *See* Baker, *supra* note 1, at 305–06 (explaining the DOJ's emphasis on incarceration of individual cartelists, which is based on the belief that incarceration is the most effective deterrent for white-collar executives); Shaffer & Nesbitt, *supra* note 2, at 325 (describing the DOJ's emphasis on individual accountability for corporate crimes such as cartel participation); *see also* Donald I. Baker, *An Enduring Antitrust Divide Across the Atlantic over Whether to Incarcerate Conspirators and When to Restrain Abusive Monopolists*, 5 EUR. COMPETITION J. 145, 146 (2009) [hereinafter Baker, *An*

While referring to the Division's record number of prison sentences imposed in 2007 as a "milestone," Scott Hammond, the Assistant Attorney General of the Division's Criminal Enforcement Program, also stated that "[n]ot only are more defendants prosecuted by the Division going to jail, but also those sentenced to jail, on average, are serving increasingly longer sentences."[12] Another Antitrust Division official also boasted that the 2007 incarceration numbers—over eighty-five years of prison sentences imposed—was "more than double the previous record."[13] Between 1990 and 2010, moreover, the DOJ sentenced 367 individuals to a total of 510 years in prison.[14]

The United States was also the starting point for the prosecution of one of the most famous cartels to date: the vitamins cartel.[15] Beginning with smaller government investigations and a private federal class action in 1997, three of the world's largest vitamins manufacturers, which made vitamins used in animal feed and processed foods, were accused of collusively fixings prices and allocating sales.[16] After its own investigation, the Antitrust Division in May 1999 announced plea agreements with two of these manufacturers, whereby the

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*Enduring Divide*] (referring to the DOJ's pride in the "dramatic increase" in jail days served by antitrust felons, along with a "dramatic decline" in civil enforcement).

12. Hammond, *supra* note 7, at 6 (graphing the average monthly incarceration trends of individuals charged with cartel participation by the Antitrust Division).

13. Thomas O. Barnett, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust Update: Supreme Court Decisions, Global Developments, and Recent Enforcement 17 (Feb. 29, 2008), *available at* http://www.justice.gov/atr/public/speeches/230627.pdf (summarizing recent developments in cartel prosecution at the Antitrust Division and providing five-year statistics on Antitrust Division enforcement).

14. *See* Connor & Lande, *supra* note 9, at 447 (summarizing the overall levels of current cartel sanctions); ANTITRUST DIV., U.S. DEP'T OF JUSTICE, TEN YEAR WORKLOAD STATISTICS REPORT 12 (2012) [hereinafter DOJ WORKLOAD STATISTICS], *available at* http://www.justice.gov/atr/public/workload-statistics.pdf (providing detailed statistics regarding the Antitrust Division's sanctioning of cartels).

15. *See* Guy Sagi, *The Oligopolistic Pricing Problem: A Suggested Price Freeze Remedy*, 2008 COLUM. BUS. L. REV. 269, 355 (2008) (characterizing the vitamins cartel case as "probably the most notorious global cartel"); Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711, 712 (2001) (referring to the vitamins cartel as "probably the most economically damaging cartel ever prosecuted under U.S. antitrust law").

16. *See* First, *supra* note 15, at 713 n.5 (citing complaint that initiated a class action suit against some of the world's largest vitamins manufacturers); Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207, 222 (2003) (providing background information on the vitamins cartel class action cases).

two agreed to pay a total of US$775 million in corporate fines.[17] The cartel, which had secretly operated for nine years before being exposed, was estimated to have affected approximately US$5 billion in sales and cost consumers hundreds of millions of dollars by making them pay higher prices for products like butter and meat.[18] In addition to the corporate fines, the Antitrust Division imposed prison sentences on five Americans and six Europeans, marking the first time non-US citizens served US prison sentences for participating in an international cartel.[19] Infamously, these top executives had secretly met in hotel suites and at conferences around the world, where they illegally allocated markets and set prices, and even referred to their illicit cartel as "Vitamins, Inc."[20]

The length of prison sentences imposed on price-fixers in the United States has continued to increase since the vitamins cartel's detection.[21] Recently, a federal grand jury in San Francisco found AU Optronics, Taiwan's largest LCD panel

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17. *See* LOUIS MORRIS BROWN ET AL., THE LEGAL AUDIT: CORPORATE INTERNAL INVESTIGATION § 7:89 (2012) (framing the individual and corporate leniency programs within competition agencies' cartel regimes); First, *supra* note 15, at 714–15 (describing the scope and implications of the vitamins cartel cases).

18. *See* BROWN ET AL., *supra* note 17, § 7:89 (cataloguing the duration and consequences of the vitamins cartel); Shaffer & Nesbitt, *supra* note 2, at 325 (commenting on the vitamins cartel, which lasted more than nine years and affected more than US$5 billion in commerce).

19. *See* BROWN ET AL., *supra* note 17, § 7:89 ("Three former Hoffmann-La Roche executives from Switzerland and three former BASF executives from Germany agreed to submit to United States jurisdiction, to plead guilty, to serve time in a United States prison, and to pay substantial fines for their roles in the vitamin cartel."); U.S. DEP'T OF JUSTICE, *Appendix A: Antitrust Division Selected Criminal Case April 1, 1996 through September 30, 1999*, http://www.justice.gov/atr/public/4523d.htm (last visited Aug. 27, 2013) (listing notable Antitrust Division cases between April 1, 1996 through September 30, 1999).

20. *See* David Barboza, *Tearing Down the Façade of 'Vitamins, Inc.'*, N.Y. TIMES, Oct. 10, 1999, at C1 (reporting on the history and prosecution of the vitamins cartel, and stating that the "scope of the conspiracy boggles the mind"); James D. Griffin, Deputy Assistant Att'y Gen, Antitrust Div., U.S. Dep't of Justice, An Inside Look at a Cartel at Work: Common Characteristics of International Cartels 14 (Apr. 6, 2000), *available at* http://www.justice.gov/atr/public/speeches/4489.pdf (describing the carrying out of the vitamins cartel, and referring to it as a "textbook" example of an illicit international cartel).

21. *See* 10 RANDY M. MASTRO & LEE G. DUNST, BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 112:42 (Robert L. Haig ed., 3d ed. 2011) ("From 2000 to 2008, the average prison sentence for foreign executives increased over 600% from a little over two months to approximately 15 months."); Connor, *supra* note 6, at 92 (graphing the trend in mean prison sentences for price-fixers in the United States).

manufacturer, guilty of participating in a conspiracy to fix prices of LCD panels sold worldwide, a US$70 billion annual market.[22] While the corporation was fined US$500 million—tying it with the vitamins case for the Antitrust Division's largest fine against a single company—twelve executives have been ordered to serve a combined total of more than thirteen years in prison.[23] Notably, the company's president and executive vice president were each sentenced to three years in prison.[24] The Antitrust Division also fined each of them US$200,000, which were among the Division's highest individual fines at the time.[25]

This Note argues that competition agencies can more efficiently deter individuals from forming cartels. In addition to ensuring that fines and prison-sentences are at optimal levels, agencies should also impose a new type of sanction: the debarment or disqualification of culpable directors and executives. Indeed, cartel sanctions must account for the type of

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22. *See* Press Release, 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: Jury Holds Companies Responsible for at Least $500 Million in Illicit Gains (March 13, 2012) [hereinafter DOJ Press Release, Jury Verdict], *available at* http://www.justice.gov/atr/public/press_releases/2012/281032.pdf (announcing the jury conviction of AU Optronics by the DOJ); *see also* Special Verdict Form United States v. AU Optonics Corp., 2012 WL 889874 (N.D. Cal. 2012) (No. CR-09-0110 SI) (identifying the instructions read to the jury in the AU Optronics case).

23. *See* Don Clark & Brent Kendall, *AU Optronics Fined $500 Million in Price-Fixing Case*, WALL ST. J. L. BLOG (Sept. 20, 2012, 7:32 PM), http://online.wsj.com/article/SB10000872396390444032404578008420937555176.html (reporting on the AU Optronics record-setting fines for its involvement in the LCD cartel); Press Release, U.S. Dep't of Justice, Taiwan-Based AU Optronics Corporation Sentenced to Pay $500 Million Criminal Fine for Role in LCD Price-Fixing Conspiracy: Company Also Sentenced to Adopt Antitrust Compliance Program (Sept. 20, 2012) [hereinafter DOJ Press Release, Compliance Program], *available at* http://www.justice.gov/opa/pr/2012/September/12-at-1140.html (announcing the fine levied on AU Optronics for participating the LCD cartel and the sentencing of defendants in the AU Optronics case).

24. *See* DOJ Press Release, Compliance Program, *supra* note 23 (describing the fines levied against and sentencing of defendants in the AU Optronics case); *AU Optronics Gets $500m Fine in US for LCD Price Fixing*, BBC NEWS (Sept. 20, 2012, 9:16 PM), http://www.bbc.co.uk/news/ business-19671214 (reporting on the AU Optronics case results and explaining that the DOJ had even sought a US$1 billion corporate fine).

25. *See* BBC NEWS, *supra* note 24 (reporting on the AU Optronics case results and characterizing the fines levied on the individuals as record-setting for the Division); *see also* KESSLER & WALLER, *supra* note 6, § 5:3 (summarizing various cartel enforcement activities in the United States).

individual the sanction is meant to deter: whether it is an employee contemplating active participation in the cartel, or a director who is determining how much effort to put into stopping it within their company. Debarment can be used to incentivize the implementation of strong competition law compliance programs, while earnings forfeiture can be used to more strongly deter all employees and executives from active participation in cartels.

Consumers worldwide have overpaid as much as twenty-five percent on goods and services because of cartels, on about US$16 trillion of affected sales, and these numbers do not even include undetected cartels. [26] These overcharges are of paramount concern for the Antitrust Division because the US Congress specifically designed the Sherman Act to protect consumers from anti-competitive behavior.[27] The US Supreme Court, in an opinion authored by Justice Scalia, has even characterized cartels as the "supreme evil of antitrust."[28]

Part I of this Note discusses the global focus on deterring cartel behavior, with the United States spearheading the initiative on individual accountability. Part II explains the different approaches used to prosecute and deter individuals from participating in cartels. Part III supports debarment of all directors who, knowingly or otherwise, oversee a corporation

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26. *See* Shaffer & Nesbitt, *supra* note 2, at 323 (describing the significant economic consequences of cartels for consumers worldwide); Connor, *supra* note 6, at 7, 100 (graphing the total known sales that have been affected by cartels and summarizing the market effects and damages caused by them).

27. *See* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting ROBERT BORK, THE ANTITRUST PARADOX 66 (1978)) (stating that Congress designed the Sherman Act as a "consumer welfare prescription"); *see also* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 107–08 (1984) (quoting *Reiter*, 442 U.S. at 343) (characterizing consumer harm as the most significant consequence of anti-competitive arrangements); Max Huffman, *Marrying Neo-Chicago with Behavioral Antitrust*, 78 ANTITRUST L.J. 105, 127 (2012) ("It is axiomatic that the goal of modern antitrust is to maximize consumer welfare."). *But see* Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 473–81, 503 (2012) (positing that Supreme Court antitrust jurisprudence rooted in the "consumer welfare" doctrine relies on Robert Bork's mistaken reference to "consumer welfare" when he actually meant "total welfare," and that "total welfare" is the more appropriate standard for evaluating reasonableness under the Sherman Act).

28. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408 (2004) (holding that a complaint alleging breach of the incumbent's duty under the Telecommunications Act of 1996 to share its network with competitors did not state a claim under Section 2 of the Sherman Act).

that participates in a cartel, and also proposes earnings forfeiture as a way to optimize monetary sanctions for directors and employees who actively participate in a cartel.

## I. *FIGHTING CARTELS: THE "SUPREME EVIL OF ANTITRUST"*[29]

In the United States, the Sherman Antitrust Act of 1890 ("the Sherman Act") is the seminal statutory authority for criminal antitrust prosecution.[30] It prohibits every contract or conspiracy in "restraint of trade" and makes every person who attempts "to monopolize any part of the trade or commerce," alone or in a conspiracy, guilty of a felony.[31] The US Supreme Court has consistently held that the Sherman Act prohibits only unreasonable restraints, recognizing that many legitimate business agreements inevitably restrain trade in some way.[32] Furthermore, legal scholars, commentators, and the US Supreme Court agree that one type of antitrust behavior stands out for its unreasonableness and thus illegality: cartel behavior.[33]

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29. *See Verizon Commc'ns*, 540 U.S. at 408 (calling cartels "the supreme evil of antitrust").

30. *See* 15 U.S.C. §§ 1–7 (2012); Reza Dibadj, *How Does the Government Interact with Business? From History to Controversies*, 5 ENTREPRENEURIAL BUS. L.J. 707, 708 (2010) (calling the Sherman Act the "foundational statute in antitrust law"); Jason Marin, *Invoking the U.S. Attorney-Client Privilege: Japanese Corporate Quasi-Lawyers Deserve Protection in U.S. Courts Too*, 21 FORDHAM INT'L L.J. 1558, 1558 n.4 (1998) (mentioning the focus of most US antitrust cases on Sections 1 and 2 of the Sherman Act and Sections 3 and 4 of the Clayton Act); Brian Bodansky, Note, *Kicking the Penalty: Why the European Court of Justice Should Allow Salary Caps in UEFA*, 36 FORDHAM INT'L L.J. 163, 167 (2013) (referring to the Sherman Act as providing the "foundation of antitrust law").

31. *See* 15 U.S.C. §§ 1, 2 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . . Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .").

32. *See, e.g.*, Ass'n of Corporate Counsel, *Antitrust Law*, 28 CORP. COUNS.'S QUARTERLY art. 9 (Jan. 2012) ("The Supreme Court has repeatedly recognized that by the language of the Sherman Act Congress intended to outlaw only *unreasonable* restraints."); Brad Taconi, *Third and Extremely Long: Why the Elimination of the BCS Seems All but Impossible*, 4 J. BUS. ENTREPRENEURSHIP & L. 181, 193 (2010) (asserting that Supreme Court jurisprudence has interpreted the Sherman Antitrust Act as prohibiting only unreasonable restraints of trade).

33. *See* Wouter P.J. Wils, *The Modernization of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation*

The US Supreme Court considers cartels per se illegal under the Sherman Act.[34] In *FTC v. Ticor Title Insurance Co.*, Justice Kennedy emphasized that the "preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom."[35] More recently, in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, Justice Kennedy reiterated that a "horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, *per se* unlawful."[36]

Part I.A of this Note describes the role of competition authorities in deterring the formation of illicit cartels. Part I.B explains the ways these authorities have deterred corporations from participating in cartels, while Part I.C focuses on how they have deterred individuals.

### A. *Competition Authorities: The Increasing Focus on Breaking Up and Deterring Cartels*

The agencies charged with enforcing competition laws are focusing increasingly on deterring the formation of cartels.[37] For

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*Replacing Regulation No. 17*, 24 FORDHAM INT'L L.J. 1655, 1717 (2001) (labeling European Community-wide cartels as "the most serious antitrust violations"); Stucke, *supra* note 3, at 450 (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)) ("Certain antitrust offenses involving 'hard-core cartels,' so labeled because of their 'pernicious effect on competition and lack of any redeeming virtue,' are conclusively presumed to be unreasonable and therefore illegal.").

34. *See* FTC v. Ticor Title Ins. Co., 504 U.S. 621, 632 (1992) (holding that title insurance companies were guilty of Sherman Act violations for horizontally colluding to set prices); *cf.* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893 (2007) (citing Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006)) (holding that a manufacturer's policy of requiring retailers to follow its suggested retail prices was not a per se Sherman Act violation).

35. *Ticor Title*, 504 U.S. at 632 (citing United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972)) (describing the importance of a free market for any society and thus the necessity of effective antitrust enforcement).

36. 551 U.S. at 893 (citing *Texaco Inc.*, 547 U.S. at 5).

37. In the United States, there are two agencies that focus on cartel prosecution: the DOJ's Antitrust Division ("Antitrust Division" or "Division") and the Federal Trade Commission ("FTC"). *See About the Division*, ANTITRUST DIV., U.S. DEP'T JUSTICE http://www.justice.gov/atr/about/index.html (last visited Mar. 18, 2013) ("The mission of the Antitrust Division is to promote economic competition through enforcing and providing guidance on antitrust laws and principles."); *About the Federal Trade Commission*, FED. TRADE COMMISSION, http://www.ftc.gov/ftc/about.shtm (last visited Sept. 14, 2013) (offering that the mission of the FTC is "[t]o prevent business

example, Scott Hammond stated in a 2008 speech that "[t]he detection, prosecution, and deterrence of cartel offenses remain the highest priority of the Antitrust Division."[38] Alexander Italianer, the European Commission's Director General for Competition, similarly declared in 2012 that "[c]artels are clearly one of the most serious competition law infringements."[39]

Cartels have indeed caused consumers significant economic damage.[40] Since 1994, the yearly median amount consumers have overpaid for affected goods and services has hovered between twelve and twenty-five percent.[41] Known affected sales

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practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity"). When discussing the prosecution of cartels in the United States, this Note focuses on the Antitrust Division rather than the FTC, as only the Division has the authority to seek criminal charges against cartelists. *Cf.* Daniel A. Crane, *A Neo-Chicago Perspective on Antitrust Institutions*, 78 ANTITRUST L.J. 43, 44, 50–51 (2012) (summarizing well-known critiques of the FTC and Antitrust Division that have been offered by the "titans" of competition law and theory, including Judges Posner, Easterbrook, and Bork).

38. *See* Hammond, *supra* note 7, at 1 (beginning his speech by explaining the "heightened emphasis on combating international cartels that target U.S. markets because of the breadth and magnitude of the harm that they inflict on American businesses and consumers"); *see also* Stucke, *supra* note 3, at 452 (citing U.S. Dep't of Justice, Antitrust Division Manual, ch. III, § C.5 (3d ed. 1998)) ("Since the Reagan Administration, . . . the Department of Justice has limited its criminal investigations to . . . hard-core cartels.").

39. *See* Alexander Italianer, Dir. Gener. for Competition, European Comm'n, Recent Developments Regarding the Commission's Cartel Enforcement 1–4 (March 14, 2012), *available at* http://ec.europa.eu/competition/speeches/text/sp2012_03_en.pdf (summarizing the Commission's basic principles of fine setting and referencing its "strong anti-cartel enforcement activity").

40. *See* Hannah L. Buxbaum, *National Jurisdiction and Global Business Networks*, 17 IND. J. GLOBAL LEGAL STUD. 165, 180 (2010) (observing that cartels hurt consumers worldwide and threaten the economic growth of developing countries); Jonathan T. Schmidt, *Keeping U.S. Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels*, 31 YALE J. INT'L L. 211, 218 (2006) ("In addition to harming the consumers of their products by charging supra-competitive prices, cartels also reduce economic efficiency by causing consumers to purchase less of a product than they otherwise would buy and by reducing the competitive pressures that member firms face to control costs and to innovate.").

41. *See* Connor, *supra* note 6, at 104 (graphing the trend in median overcharges consumers caused by cartels); *cf.* Deborah J. Buswell, *Foreign Trade Antitrust Improvements Act: A Three Ring Circus—Three Circuits, Three Interpretations*, 28 DEL. J. CORP. L. 979, 980 (2003) (quoting West Virginia's Attorney General publicly stating that the "vitamin cartel caused more economic damage to consumers in the United States than any other illegal cartel in history").

have also increased significantly; out of the more than US$16 trillion of total sales affected since 1995, over US$14 trillion of those sales occurred within the last seven years.[42] For example, the recently detected airline fuel surcharge cartel, which involved more than twenty airlines, affected over US$1 trillion in sales over a six-year period.[43] Meanwhile, a majority of the affected sales have occurred within the European Union, and over half of detected cartels have operated there.[44] Numerous competition authorities around the world are thus focusing more and more on this growing international issue.[45]

### 1. "The Race to the Prosecutor's Door"[46]: Using Leniency Programs to Break Up Cartels

Leniency programs, which generally provide corporate immunity from government sanctions to the first company to cooperate with authorities, create a race among cartelists to

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42. *See* Juan M. Álcala, *Transnational Disputes in a Global Economy*, 75 TEX. B.J. 512, 513 (2012) ("Total known affected sales has seen a dramatic increase as well, from less than $1 trillion before 1995 to an astounding $16 trillion in 2008.").

43. *See* KESSLER & WALLER, *supra* note 6, § 5:16 (describing various international cartels that have been discovered in recent years by competition authorities); Press Release, European Union, Antitrust: Commission Fines 11 Air Cargo Carriers €799 million in Price Fixing Cartel, Reference: IP/10/1487 (Nov 9, 2010) (announcing EU Competition Commission's fines levied against numerous airlines for operating a worldwide cartel affecting cargo services).

44. *See* Tiffany Chieu, *Class Actions in the European Union? Importing Lessons Learned from the United States' Experience into European Community Competition Law*, 18 CARDOZO J. INT'L & COMP. L. 123, 124 (2010) ("In the European Union (EU), cartels engaging in anti-competitive practices have been estimated to cost consumers a minimum of €13 billion and a maximum of €37 billion annually."); Connor, *supra* note 6, at 8–9 (providing pie charts displaying distribution of cartels' known affected sales and operations throughout the world).

45. *See* D. Daniel Sokol, *Limiting Anticompetitive Government Interventions that Benefit Special Interests*, 17 GEO. MASON L. REV. 119, 144 (2009) (describing cartel enforcement as a "low hanging fruit" which many young antitrust authorities are focusing on for easier and earlier effective antitrust enforcement results); D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 53 (2007) [hereinafter Sokol, *Monopolists Without Borders*] ("Greater harmonization of merger and cartel enforcement has been the focus of many antitrust agencies and the private antitrust bar for some time.").

46. Ann O'Brien, Senior Counsel to the Deputy Assistant Att'y Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Cartel Settlements in the U.S. and E.U.: Similarities, Differences & Remaining Questions 10 (June 6, 2008), *available at* http://www.justice.gov/atr/public/speeches/235598.pdf (referring to the "race-to-the-prosecutor's-door" mentality that "has successfully fueled leniency programs around the world").

report on each other, akin to a classic prisoner's dilemma.[47] In most leniency programs, this immunity extends to current and former directors of the company, as well as to officers and employees.[48] Scott Hammond recently referred to the Antitrust Division's leniency program as its "most effective investigative tool."[49] Indeed, it has been linked to over ninety percent of the DOJ's cartel fines.[50]

While the US leniency program was unique when it was adopted twenty years ago, more than sixty other jurisdictions now have similar programs.[51] In France, for example, Article L464-2 of the *Code de Commerce* provides that a company may be granted total or partial exemption from financial penalties if "it has helped to establish the existence of [a cartel] and to identify its perpetrators by providing information which the council or

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47. *See* Megan Dixon, *A Tension in the US Approach to International Cartel Enforcement: At What Point Does Aggressive Pursuit of Individuals Undercut the Corporate Leniency Programme?*, 8 COMPETITION L. INT'L 82, 85 (2012) (crediting the DOJ's leniency program for its "impressive" overall enforcement record); O'Brien, *supra* note 46, at 10 (commenting on the efficacy of leniency programs and their value as an investigative tool for competition authorities).

48. *See, e.g.*, Trish Henry & Lisa Huett, *Australia: Cartels*, 2013 ASIA-PAC. ANTITRUST R. 21, 23 (summarizing the current state of cartel regulation in Australia and specifically addressing the immunity and leniency programs in Australia); AUSTL COMPETITION & CONSUMER COMM'N, ACCC IMMUNITY POLICY INTERPRETATION GUIDELINES § 2.10 para. 66 (July 2009), *available at* http://www.accc.gov.au/system/files/Immunity%20policy%20for%20cartel%20conduct%20and%20interpretation%20guidelines.pdf (explaining Australia's leniency program and providing guidelines for companies operating within Australia).

49. Hammond, *supra* note 7, at 13 (describing the benefits of the leniency program).

50. *See* Michael Reynolds et al., *EU Competition Policy in the Financial Crisis: Extraordinary Measures*, 33 FORDHAM INT'L L.J. 1670, 1724 (2010) ("The immunity and leniency regime in the EU is arguably the Commission's most effective tool in cartel detection."); Werden et al., *supra* note 10, at 223 (describing the Antitrust Division's leniency program as "the most important tool either for detecting cartels or for developing the evidence necessary to prosecute them"). *But see* D. Daniel Sokol, *Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement*, 78 ANTITRUST L.J. 201, 236 (2012) (concluding, after performing a practitioners' survey, that "while, overall, the [DOJ] leniency policy works, it is not as effective as DOJ rhetoric suggests").

51. *See* Baker, *supra* note 1, at 309 (discussing the worldwide encouragement of whistleblowing policies); Robert W. Tarun & Peter P. Tomczak, *A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 183 (2010) ("The success of the Antitrust Division's Corporate and Individual Leniency Programs has led other countries to adopt leniency programs.").

the administration did not have access to beforehand."[52] In December 2011, French Authorities fined four major laundry detergent manufacturers EU€367.9 for secretly fixing prices during a seven-year cartel.[53] Unilever, which initiated the investigation by reporting on its co-conspirators and applying for amnesty in 2008, obtained full immunity from the fines.[54]

Meanwhile, in Japan, the first company to report its involvement in a cartel is entitled to full immunity from administrative charges.[55] Since Japan initiated its leniency program at the end of 2005, the number of amnesty applicants has increased each year, reaching 143 applications in the period between April 2011 and March 2012.[56] Finally, Australia's leniency program, which places a heavy burden of cooperation on amnesty-seeking companies and their employees, grants successful applicants full immunity from criminal and non-private civil proceedings.[57]

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52. CODE DE COMMERCE [C. COM] art. L464-2 IV (Fr.); *see* Marc Lévy & Natasha Tardif, *France: Cartel Regulation*, 2013 EUR. ANTITRUST R. 64, 66–68 (summarizing the leniency program in France).

53. *See* Lévy & Tardif, *supra* note 52, at 67 (listing notable cartel detections and prosecutions in France); Press Release, Autorité de la concurrence, The Autorité de la Concurrence Fines a Cartel Between the Four Major Laundry Detergent Manufacturers a Global Amount of €367.9 Million (Dec. 8, 2011), http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=389&id_article=1735 (announcing the "most important leniency case investigated" by the Autorité).

54. *See* Lévy & Tardif, *supra* note 52, at 67 (describing the infamous laundry detergent cartel and the government prosecution of it in France); Press Release, Autorité de la concurrence, *supra* note 53 (announcing the break up of the laundry detergent cartel by the Autorité).

55. *See* Shiteki-dokusen no Kinshi oyobi Kōseitorhiki no Kakuho ni Kansuru Hōritsu [Dokusen Kinshihō] [Act on the Prohibition of Private Monopolization and Maintenance of Fair Trade], Act No. 54 of 1947, art. 7-2 para. 10 (Japan); Hideto Ishida & Etsuko Hara, *Japan: Cartels*, 2013 ASIA-PACIFIC ANTITRUST R. 72, 73–74 (summarizing the current state of cartel regulation in Japan and describing Japan's leniency system).

56. *See* Ishida & Hara, *supra* note 55, at 73 (explaining Japan's leniency program and providing the yearly application numbers for the program); Mitsuo Matsushita, *Reforming the Enforcement of the Japanese Antimonopoly Law*, 41 LOY. U. CHI. L.J. 521, 521 (2010) (discussing the 2005 amendment to Japan's Anti-Monopoly Law, which contained provisions outlining Japan's antitrust leniency program).

57. *See* Henry & Huett, *supra* note 48, at 23–24 (summarizing the current state of cartel regulation in Australia and describing Australia's leniency program and its effects); AUSTL. COMPETITION & CONSUMER COMM'N, *supra* note 48, § 3.2 (explaining Australia's leniency program, its application, effects, and results).

Some have argued that leniency programs work so well because of the harshness of cartel sanctions.[58] Essentially, the more threatening potential sanctions are, the more attractive a leniency program—and its promise of amnesty from those sanctions—becomes to executives.[59] Moreover, the incentive to quickly seek immunity is rooted in both the desire to avoid criminal sanctions and the awareness that the first cartel participant (under the US program) to come forward and cooperate will be able to avoid liability.[60] Furthermore, through the Antitrust Division's "Amnesty Plus" program, companies under investigation for participating in a cartel can receive beneficial treatment for reporting, to the Antitrust Division, another, undetected, cartel.[61] By playing cartelists against each

58. *See* Werden et al., *supra* note 10, at 234 (describing the advantages of coupling the Antitrust Division's leniency program with criminal sanctions); Baker, *supra* note 1, at 308 (asserting that the DOJ's leniency program has been "seriously enhanced because it is coupled with such an effective criminal enforcement program against individual executives").

59. *See* Costanza Nicolosi, *No Good Whistle Goes Unpunished: Can We Protect European Antitrust Leniency Applications from Discovery?*, 31 NW. J. INT'L L. & BUS. 225, 234 (2011) (stating that the increasing sanctions in both the United States and European Union "have made leniency even more attractive"); Daniel J. Bennett, *Killing One Bird with Two Stones: The Effect of* Empagran *and the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 on Detecting and Deterring International Cartels*, 93 GEO. L.J. 1421, 1444 (2005) ("In economic terms, the firm will participate in the amnesty program only where the expected cost of continuing to participate in the cartel exceeds the expected cost of joining the amnesty program.").

60. *See* 2 WEST, MATERIALS ON ANTITRUST COMPLIANCE § 22:6 (3d ed. 2013) (describing the various benefits of receiving leniency from a competition authority, and the severe consequences of missing out on it); Rachel J. Adcox, *Getting Your Best Outcome Post-AU Optronics: Pay No Attention to That Case Behind the Curtain*, ANTITRUST, Summer 2012, at 78, 78 ("[W]inning the race to the DOJ as an amnesty applicant is the best way to either avoid a guilty plea and fine altogether or substantially reduce the fine that would result from admitting guilt.").

61. *See* Patricia Carmona Botana, *Prevention and Deterrence of Collusive Behavior: The Role of Leniency Programs*, 13 COLUM. J. EUR. L. 47, 53 (2007) ("Under [Amnesty Plus], even though an undertaking may not qualify for immunity in the initial case under investigation, the value of its assistance in disclosing the second secret collusive practice will lead to immunity for the second offense and a substantial additional reduction (the 'plus') in the calculation of the fine for its participation in the first offense."); Barnett, Criminal Enforcement, *supra* note 10, at 5 (explaining the Antitrust Division's "Amnesty Plus" program and its similarities to the traditional leniency program).

other, leniency programs not only help detect cartels, but also have strong destabilizing effects that deter their formation.[62]

### B. *Organized Crime: Punishing Corporations for Participating in Cartels*

Competition authorities have fined companies billions of dollars for participating in cartels.[63] In the United States, the Antitrust Division's yearly criminal fines, which were already significant, are continuing to increase.[64] Indeed, the Division obtained US$1 billion in criminal fines in FY 2009, over US$500 million in both FY 2010 and FY 2011, and over US$1.1 billion in FY 2012.[65] Since 1995, the Antitrust Division has fined almost one hundred companies at least US$10 million; moreover, nineteen of those companies were fined over US$100 million each.[66]

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62. *See* Werden et al., *supra* note 10, at 234 (describing the cartel-destabilizing effects of the Antitrust Division's leniency program); Shaffer & Nesbitt, *supra* note 2, at 334 (explaining the structure and benefits of leniency programs).

63. *See* Dixon, *supra* note 47, at 83 (asserting that the DOJ has been at the forefront of pursuing and criminally prosecuting international cartels, "and it has been extremely successful at exporting many of the tenets of its programme to competition enforcers around the globe"); Daniel J. Fletcher, *The Lure of Leniency: Maximizing Cartel Deterrence in Light of* La Roche v. Empagran *and the Antitrust Criminal Penalty Enhancement and Reform Act of 2004*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 341, 358 (2005) (referring to the fact that, between 1997 and the article's publication date, the Antitrust Division had collected "well over $10 billion" in fines from international cartels).

64. *See* MASTRO & DUNST, *supra* note 21, § 112:40 (noting that criminal sanctions worldwide have "burgeoned in large part due to the rapid expansion of the Antitrust Division's prosecution of international cartels"); Donald C. Klawiter, *Deterrence and Punishment in Antitrust: Antitrust Criminal Sanctions: The Evolution of Executive Punishment*, 8 COMPETITION POL'Y INT'L 90, 91 (2012) ("Over the past fifteen years, corporate fines have increased dramatically.").

65. *See* Letter from Gibson Dunn, to Clients and Friends, 2012 Year-End Criminal Antitrust & Competition Law Update 1 (Jan. 7, 2013) [hereinafter Gibson Dunn Year End Review], *available at* http://www.gibsondunn.com/publications/Documents/2012YearEnd-Criminal-Antitrust-Competition-Update.pdf (summarizing, for clients and friends of the firm, recent developments in criminal antitrust enforcement); *see also Antitrust Division Spring 2013 Update*, U.S. DEP'T JUST., http://www.justice.gov/atr/public/division-update/2013/criminal-program.html (last visited June 26, 2013) (announcing total fines achieved by the DOJ in the past decade).

66. *See* KESSLER & WALLER, *supra* note 6, § 5:3 (providing a history of DOJ fines levied against cartels, with a specific history of corporate fines); *see also* Antitrust Division, U.S. Dep't of Just., *Sherman Act Violations Yielding a Corporate Fine of $10 Million or More*, http://www.justice.gov/atr/public/criminal/sherman10.pdf (last visited Oct.

Despite these steep penalties, the Antitrust Division has not even imposed the highest level of fines among competition authorities, as the EU Competition Commission's total fines surpassed the Antitrust Division's in 1999.[67] The EU Competition Commission has levied almost EU€9 billion (approximately US$12 billion) in corporate fines in the past five years, compared with Antitrust Division's US$4 billion.[68] Overall, the EU Competition Commission fined thirty-seven companies approximately US$2.48 billion in FY 2012.[69]

Many other competition authorities besides the Antitrust Division and the EU Competition Commission have likewise fined organizations significant sums for cartel participation.[70] In September 2010, Brazil's Administrative Council for Economic Defense fined five companies and seven executives a total of US$1.66 billion for their involvement in an industrial gas cartel.[71] Chile's National Competition Tribunal recently fined

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9, 2013) (listing all Sherman Act violations that have yielded corporate fines from the Antitrust Division of US$10 million or more).

67. *See* Bruno Lasserre, *Antitrust: A Good Deal for All in Times of Globalization and Recession*, 7 COMPETITION POL'Y INT'L 245, 259 (2011) ("It is trite to say that the overall amount of those fines has significantly increased over the recent years, both at European level and in a number of Member States."); Connor, *supra* note 6, at 50 (summarizing developments in corporate sanctions levied on cartelists).

68. *See* Gibson Dunn Year End Review, *supra* note 65, at 2, 16 (graphing overall corporate fines by the Antitrust Division and the EU Competition Commission); *see also* Shaffer & Nesbitt, *supra* note 2, at 324 (explaining that government fines account for more than half of the US$63.3 billion in fines levied on corporate cartelists, with the "vast bulk" of government fines imposed by the EU Competition Commission, national competition authorities within the European Union, and the DOJ).

69. *See European Commission Issues Record Fine*, ORRICK ANTITRUST & COMPETITION NEWSLETTER (Orrick, Herrington, & Sutcliffe LLP/Europe), Feb. 4, 2013, *available at* http://blogs.orrick.com/antitrust/2013/02/04/european-commission-issues-record-fine/ ("In 2012, the Commission issued four decisions with fines totaling €1.74 billion ($2.31 billion)—€1.88 billion ($2.5 billion) when including re-imposed fines."); Gibson Dunn Year End Review, *supra* note 65, at 2 (noting the EU Competition Commission's imposition of the largest fine in its history).

70. *See* KESSLER & WALLER, *supra* note 6, § 5:18 (evaluating the significant corporate fines of various national competition authorities). *See generally* DANIEL J. FETTERMAN & MARK P. GOODMAN, DEFENDING CORPORATIONS AND INDIVIDUALS IN GOVERNMENT INVESTIGATIONS § 8.1 (2012) (discussing national competition authorities' enhancement of their anti-cartel investigative and enforcement activities).

71. *See* KESSLER & WALLER, *supra* note 6, § 5:18 ("[On September 1, 2010,] CADE levied total fines of 2.9 billion Brazilian real ([US]$1.66 billion) against five companies and seven executives."); Shannon Henson, *Brazilian Regulator Levies $2B Gas Cartel Fine*, LAW 360 (Sept. 1, 2010), http://www.law360.com/articles/191026 (announcing the

two of Chile's largest pharmaceutical companies US$19 million for participating in a pharmaceutical drugs cartel.[72] In 2007, the British Office of Fair Trading ("OFT") fined British Airways UK£121.5 million for its involvement in the airline fuel surcharge cartel, though that fine was eventually reduced to UK£58.5 million.[73] In 2010, the UK agency fined two tobacco companies and ten retailers UK£225 million for forming a cartel in the tobacco retail market.[74] Meanwhile, the South Korea Fair Trade Commission fined ten LCD manufacturers approximately US$175 million for participating in the same LCD cartel as AU Optronics, mentioned above.[75] Procter & Gamble, Colgate-

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Brazilian Administrative Council for Economic Defense's detection and prosecution of five companies for forming an industrial gas cartel).

72. *See* KESSLER & WALLER, *supra* note 6, § 5:18 ("On January 31, 2012, the TDLC fined two of Chile's largest pharmaceutical companies $19 million each for their participation in a cartel to fix prices in the pharmaceutical drug market, the largest fine successfully imposed by the TDLC to date."); Melissa Lipman, *Chile Fines 2 Pharmacy Chains $38M for Price Fixing*, LAW 360 (Jan. 31, 2012), http://www.law360.com/articles/304877 (announcing fines levied by Chilean court on two of the country's largest pharmacy chains).

73. *See* Press Release, U.K. Office of Fair Trading, British Airways to Pay Record £121.5m Penalty in Price Fixing Investigation (Aug. 1, 2007), *available at* http://www.oft.gov.uk/news-and-updates/press/2007/113-07#.US6Eq6GDQXw (announcing the prosecution of British Airways for participating in the airline fuel surcharge cartel); *BA's Price-Fix Fine Reaches £270m*, BBC NEWS (Aug. 1, 2007, 11:17 PM), http://news.bbc.co.uk/2/hi/business/6925397.stm (reporting on the fines levied against British Airways by both the DOJ and the UK Office of Fair Trading ("OFT")); *see also* Press Release, UK Office of Fair Trading, British Airways to Pay £58.5 Million Penalty in OFT Fuel Surcharge Decision (Apr. 19, 2012), *available at* http://www.oft.gov.uk/news-and-updates/press/2012/33-12#.US6EraGDQXw (announcing a reduction in British Airways' corporate fine for its participation in the airline fuel surcharge cartel by the OFT).

74. *See* Press Release, U.K. Office of Fair Trading, *OFT Imposes £225m Fine Against Certain Tobacco Manufacturers and Retailers Over Retail Pricing Practices* (Apr. 16, 2010), http://www.oft.gov.uk/news-and-updates/press/2010/39-10 (announcing the prosecution of tobacco manufacturers and retailers for forming a retail price cartel); *OFT Imposes Record £225m Fine Over Tobacco Price-Fixing*, TELEGRAPH.CO.UK (Apr. 16, 2010, 7:45 AM), http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/7596483/OFT-imposes-record-225m-fine-over-tobacco-price-fixing.html (reporting on the OFT's prosecution of a tobacco retail price cartel).

75. *See* KESSLER & WALLER, *supra* note 6, § 5:18 ("In October 2011, in its most recent significant enforcement action, the KFTC fined 10 TFT-LCD manufacturers a total of approximately 194 billion won ($175 million) for their participation in a price-fixing cartel in the TFT-LCD glass panel market."); Press Release, Korea Fair Trade Comm'n, KFTC Fines 10 LCD Producers 194 Billion Won for TFT-LCD International Cartel (Oct. 28, 2011), *available at* http://eng.ftc.go.kr/ (follow "News Room" tab to the Press Release # 47 hyperlink) (announcing Korea Fair Trade Commission's fines of LCD producers for participating in the LCD cartel).

Palmolive, and Henkel AG & Co. were fined EU€367.9 million by Autorite de la Concurrence, the French competition agency, for forming a cartel in the laundry detergent market.[76] Recently, India's Competition Commission imposed a record fine of approximately 63.1 billion Rupees (US$1.1 billion) on eleven cement manufacturers and the Cement Manufacturers' Association for their anti-competitive activities.[77] Around the world, colluding companies are paying the price when their competition crimes are uncovered.[78]

### C. *White-Collar Crime: Punishing Individuals for Participating in Cartels*

In addition to corporate sanctions and deterrence, competition authorities are seeking to deter individual employees and executives from forming cartels.[79] Corporate fines are meant to incentivize corporations, through their directors, to implement strong antitrust monitoring and compliance programs so as to prevent anti-competitive activities.[80] These fines are therefore designed, through internal

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76. *See* KESSLER & WALLER, *supra* note 6, § 5:18 (listing various cartel cases completed by national competition agencies); Press Release, Autorite de la Concurrence, *supra* note 53 (announcing the French competition agency's sanctioning of laundry detergent manufacturers).

77. *See* Gibson Dunn Year End Review, *supra* note 65, at 2 (noting recent accomplishments of various competition agencies around the world); Deepika M G et al., *Cartel in Cement Industry in India: Is There Enough Evidence* 5 (Amrita Sch. of Bus., Working Paper No. 133/2012), *available at* http://amrita.edu/asb/pdfs/workingpaper/Working-Paper-No.133.pdf (referencing the India Competition Commission's censure of cement manufacturers for their engagement in a cartel).

78. *See supra* notes 63–77 and accompanying text (explaining the severe fines corporations around the world face when they are caught participating in cartels).

79. *See* Dixon, *supra* note 47, at 82 (discussing the "important—and often highly divisive—questions about whether and what type of criminal sanctions are appropriate for individuals" that engage in cartel behavior); Werden et al., *supra* note 10, at 214 (calling sanctions on corporations "insufficient," and thus arguing that, like in the United States, individual sanctions are necessary in order to sufficiently deter the formation of cartels); Sokol, *supra* note 50, at 230 ("The weak link in anti-cartel compliance may be at the individual rather than the firm level.").

80. *See* Bruce H. Kobayashi, *Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, 69 GEO. WASH. L. REV. 715, 736 (2001) (stating that corporate fines create "an incentive for the corporation to monitor, detect, and prevent crimes committed by agents acting within the scope of their employment"); Christine Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Roundtable Conference with Enforcement Officials Before the ABA Section of

monitoring by directors and executives, to deter employees and executives from engaging in such conspiracies, and thus they are an indirect deterrent.[81] Some scholars have also argued that, because of poorly designed sanction regimes, the incentives for companies to strengthen their competition law compliance mechanisms remain inefficient.[82] Hence the Antitrust Division's current focus on sanctioning individual cartelists in addition to corporations, which is an attempt to deter individuals more directly.[83]

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Antitrust Law Spring Meeting 13 (Apr. 23, 2010), *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Jun10_EnforcerRT6_24f.authcheckdam.pdf (saying that, in Varney's experience, corporate sanctions "are a very good incentive to get everybody focused on what you need to do to ensure knowledge and compliance with all relevant [competition] laws throughout the company"); *cf.* Sokol, *supra* note 50, at 203 ("The success of any cartel enforcement program is substantially linked to the creation and effective implementation of a compliance culture.").

81. *See* Pierre Fleckinger et al., *CEO's Morality, Compensation and Illicit Behavior*, EUR. ASS'N FOR RESEARCH IN INDUS. ECON. § 1 (Mar. 2013), *available at* http://www.webmeets.com/files/papers/earie/2013/474/FleckingerLafayMonnier2013.pdf ("[A]s soon as the fine is high enough, the shareholders must cooperate with the government to reinforce fraud detection, which can lead the firm to adopt compliance programs and to put in place internal monitoring schemes."); Varney, *supra* note 80, at 13 (describing the corporate compliance structure incentivized by corporate fines); *see also* Kobayashi, *supra* note 80, at 736 (explaining corporate fines' indirect way of deterring individual employees from participating in cartels).

82. *See, e.g.*, Joseph Murphy & William Kolasky, *The Role of Anti-Cartel Compliance Programs in Preventing Cartel Behavior*, ANTITRUST, Spring 2012, at 61, 63 (offering, as a reason for the lack of effective compliance programs, that "antitrust authorities, both in the United States and the European Union, place little emphasis on the importance of an effective compliance program to prevent cartel behavior"); Klawiter, *supra* note 64, (arguing that "[n]either the Antitrust Division nor corporate compliance programs have been aggressive enough at imparting information that will literally keep executives and their counsel up at night"); Stucke, *supra* note 3, at 482 (referring to the ability of shareholders to effectively discipline corporate management as "questionable"); Sokol, *supra* note 50, at 223–25, 230 (noting that, because some antitrust compliance programs "may now include nothing more than a day of lectures with some PowerPoint slides," such programs "do not change the inherent nature of a corporation's culture," and therefore "antitrust needs to better align the incentives for firm governance to increase the costs of non-compliance"); Fleckinger et al., *supra* note 81, § 3.4 (commenting on the limits of optimal deterrence theory).

83. *See* Sanghyun Lee, *Using Action in Damages to Improve Criminal Penalties Against Cartels: Comparative Analysis of Competition Law of United States and South Korea*, 16 CURRENTS: INT'L TRADE L.J. 55, 55 (2007) (referring to the United States' "strong antitrust penalty regime that punishes both individuals and enterprises with imprisonment and heavy fines"); Hammond, *supra* note 7 (articulating the Antitrust Division's strong reliance on individual sanctions to deter the formation of cartels).

Until 2008, the United States was essentially the only country in which individuals were incarcerated for cartel behavior, even though the DOJ was responsible for prosecuting only one-third of such individuals worldwide.[84] The DOJ has even imprisoned numerous non-US citizens for their participation in international cartels.[85] Some scholars have explained these national differences from a cultural perspective, observing that, in the United States, people are more willing to severely punish white-collar defendants than they are in other countries.[86] One researcher, after empirically evaluating various cultures and competition policies, found that nations with "individualistic values" were likely to have more rigorous anti-cartel policies than those with "collectivist" values.[87] The researcher further described the impact of social values on cartel policies as "undeniable."[88]

Numerous national competition authorities have the statutory authority to incarcerate individual cartelists, even though they rarely use that authority.[89] In France, for example, any person who "fraudulently takes a personal and decisive part in the conception, organisation or implementation" of a cartel is liable for up to four years in prison under Article L420 of

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84. *See* Shaffer & Nesbitt, *supra* note 2, at 324 (referring to the DOJ's imposition of jail sentences as "almost unique"); Connor, *supra* note 6, at 82 (summarizing individual cartel sanctions around the world).

85. Indeed, "[s]ince May 1999, more than forty foreign defendants have served or are serving prison sentences in the United States for international cartel offenses or obstructing a cartel investigation." Shaffer & Nesbitt, *supra* note 2, at 325; *see* Lee, *supra* note 83, at 55 (describing the United States' regime as a "strong" one that punishes corporations, as well as both US and non-US citizens, for their participation in cartels).

86. *See* Shaffer & Nesbitt, *supra* note 2, at 335 ("Not all publics are convinced that cartel offenses merit the criminal penalty of jail time, which is advocated most vocally by the United States."); Baker, *An Enduring Divide*, *supra* note 11, at 158 (theorizing about the "social, political and judicial attitudes" that affect the "fundamentally different public perceptions about how evil cartels are and how seriously individual wrongdoers should be punished").

87. Ki Jong Lee, *Culture and Competition: National and Regional Levels*, 21 LOY. CONSUMER L. REV. 33, 39 (2008) (analyzing, empirically, the various factors affecting national cartel policies and attitudes).

88. *See id.* (noting that, in addition to cultural factors, legal and institutional factors also are likely to affect cartel enforcement).

89. *See, e.g.*, CODE DE COMMERCE [C. COM] art. L420 (Fr.) (prescribing that, in France, cartel offenders are liable for up to four years in prison); Competition and Consumer Act 2010 (Cth) §§ 44ZZRF, 44ZZRG, 79(1)(e) (Austl.) (prescribing that, in Australia, a convicted cartelist faces up to ten years in prison).

France's *Code de Commerce*.[90] Meanwhile, in Australia, a convicted cartelist faces up to ten years in prison under the Australian Consumer and Competition Act of 2010.[91] Under recent amendments to Japan's Anti-Monopoly Act, cartelists in Japan likewise face up to five years of imprisonment with hard labor.[92] The EU Competition Commission, however, lacks the authority to impose prison sentences on individuals for their participation in cartels.[93] Overall, there are many national competition authorities that have the statutory authority to imprison individuals for anti-competitive activities, yet the structure and

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90. CODE DE COMMERCE [C. COM] art. L420 (Fr.); *see* Lévy & Tardif, *supra* note 52, at 64–65 (summarizing France's substantive tests for determining competition violations).

91. *See* Competition and Consumer Act 2010 (Cth) §§ 44ZZRF, 44ZZRG, 79(1)(e) (Austl.); Henry & Huett, *supra* note 48, at 22–23 (explaining the penalties faced by convicted cartelists in Australia).

92. *See* Shiteki-dokusen no Kinshi oyobi Kōseitorhiki no Kakuho ni Kansuru Hōritsu [Dokusen Kinshihō] [Act on the Prohibition of Private Monopolization and Maintenance of Fair Trade], Act No. 54 of 1947, art. 89 (Japan); Ishida & Hara, *supra* note 55, at 73 (summarizing Japan's criminal cartel sanction regime); *Antitrust Alert: Japan Passes Amendments to the Anti-Monopoly Act to Strengthen Cartel Enforcement and Expand the Scope of Single-Firm Conduct Subject to Fines*, JONES DAY (June 2009), http://www.jonesday.com/antitrust-alert—japan-passes-amendments-to-the-anti-monopoly-act-to-strengthen-cartel-enforcement-and-expand-the-scope-of-single-firm-conduct-subject-to-fines-06-10-2009/ (reporting on amendments made to Japan's Anti-Monopoly Act, including the increase of prison sentences for cartelists from three years to five). Interestingly, Japan's Anti-Monopoly Act was passed immediately after the Second World War, under the influence of General Douglas MacArthur—then the Supreme Commander for Allied Powers in Japan—so as to increase the distribution of income and the ownership of the means of production and trade. *See* James D. Fry, Note, *Struggling to Teethe: Japan's Antitrust Enforcement Regime*, 32 LAW & POL'Y INT'L BUS. 825, 827–30 (2001) (providing a brief history of the international political influences present during the implementation of Japan's Anti-Monopoly Act in 1947). MacArthur, fearing political interference from both the US State Department and War Department, intimidated the Japanese Diet into quickly passing his own Anti-Monopoly Act, which dissolved the powerful family-owned industrial conglomerates, known as *zaibatsu*, which accounted for a quarter of all paid-up capital in Japan. *See id.* (noting that the Japanese government strongly opposed the proposed dissolution of the *zaibatsu*). Some historians have argued that MacArthur's actions were influenced by the presidential ambitions he held at the time. *See id.* (explaining that General MacArthur even threatened Prime Minister Katayama, saying that if the Japanese caused him any troubles, he would cause troubles for Japan when he became president).

93. *See* KESSLER & WALLER, *supra* note 6, § 5:16 (noting that the EU Competition Commission does not have the ability to impose criminal sanctions for antitrust violations); Douglas H. Ginsburg & Joshua D. Wright, *Who Should Be the Target of Cartel Sanctions?*, 6 COMPETITION POL'Y INT'L 3, 13 (2010) (stating that the European Union has "no provision for imposing any sanction—fine or jail time—upon an individual" for cartel behavior).

design of individual sanctions has not been consistent among the numerous jurisdictions.[94]

## II. *STOPPING THE "SUPREME EVIL"*[95]*: MAKING THE PUNISHMENT FIT THE CRIME*

Traditionally, the sanctioning of individual cartelists has taken two forms: incarceration and fines.[96] Part II.A explains optimal deterrence theory, which is frequently used to evaluate the appropriate level of sanctions for cartelists. Part II.B discusses the policies of various competition agencies in sanctioning and deterring individual cartel participation. Part II.C examines alternative methods of sanctioning individuals charged with cartel participation.

### A. *Optimal Deterrence Theory and Its Role in Antitrust Policy*

In 1983, Professor William Landes, of the University of Chicago Law School, proposed using optimal deterrence theory to determine appropriate antitrust sanction levels.[97] Building on the theorems of famed economists George Stigler, Gary Becker, and Ronald Coase (all of the University of Chicago), Landes argued that the optimal sanction level for deterring anti-competitive behavior is found by dividing the expected harm from the behavior by the probability of its detection (proper

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94. *See supra* notes 89–93 and accompanying text (explaining different countries' statutory authority to imprison individuals convicted of cartel offences).

95. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408 (2004) (referring to cartels as the "supreme evil of antitrust").

96. *See* Glenn Harrison & Matthew Bell, *Recent Enhancements in Antitrust Criminal Enforcement: Bigger Sticks and Sweeter Carrots*, 6 HOUS. BUS. & TAX L.J. 206, 229 (2006) (explaining that the combination of fines and incarceration gives potential antitrust violators a strong incentive to take advantage of leniency programs so as to avoid prosecution); Stucke, *supra* note 3, at 457 (evaluating the assumed goal of deterrence in cartel prosecutions and the intersection of antitrust policy and morality considerations).

97. *See* William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652 (1983) (arguing for a Coasean approach to determining effective sanctions for antitrust violations); *see also* Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 BYU L. REV. 315, 319 (2011) ("The most generally accepted approach to optimally deterring antitrust violations was developed by Professor William Landes . . . .").

sanction = expected harm / detection probability).[98] Not surprisingly, Landes' argument is consistent with what is known as the Chicago school of thought on the intersection of law and economics; indeed, other proponents of the Chicago school accept Landes' principle "almost universally."[99]

The critics of optimal deterrence theory have pointed to the theory's shortcomings in relation to especially weak detection rates, the inability of many firms to pay the considerable fines and thus their marginalized deterrence value, and, finally, the characteristic lack of risk-aversion among corporate executives.[100] Moreover, critics argue, sanctions should be increased beyond the level of merely cancelling out the expected profit from participating in a cartel, especially considering cartels' lack of any redeeming value.[101]

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98. *See* Landes, *supra* note 97, at 652–57 (citing Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960)) (describing the basic model of optimal sanctions); *see also* George J. Stigler, *The Kinky Oligopoly Demand and Rigid Prices*, 55 J. POL. ECON. 432 (1947). In fact, Sigler is widely considered a father of the Chicago School. *See, e.g.*, Su Sun, *Schools of Antitrust—A Parallelogram of Forces*, 78 ANTITRUST L.J. 37, 39 (2012) (noting that the Chicago School is "led by" Stigler). For further explanation of Landes' theory on optimal deterrence in antitrust sanctions, see Lande & Davis, *supra* note 97, at 319–20 (analyzing Landes' optimal deterrence theory). For a brief and informative discussion on Coase theorem, see, for example, Michael I. Swygert & Katherine Earle Yanes, *A Primer on the Coase Theorem: Making Law in a World of Zero Transaction Costs*, 11 DEPAUL BUS. L.J. 1 (1998) (summarizing Coase theorem and its influence on legal theory).

99. *See* Lande & Davis, *supra* note 97, at 320 n.15 (comparing antitrust regimes' effectiveness in deterring cartel behavior); Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 125–26 (1993) (examining the treble damages provisions of the US antitrust regime); *cf.* Crane, *supra* note 37, at 44 (characterizing Richard Posner, Frank Easterbrook, Aaron Director, and Robert Bork as some of the "titans" of the Chicago School); William H. Page, *A Neo-Chicago Approach to Concerted Action*, 78 ANTITRUST L.J. 173, 174 (2012) ("Chicago scholars uniformly identify cartels as the primary target of antitrust enforcement.").

100. *See* Fleckinger et al., *supra* note 81, § 3.4 (commenting on the limits of optimal deterrence theory); Stucke, *supra* note 3, at 488 ("Although the antitrust community has generally accepted the optimal deterrence theory in determining criminal penalties for antitrust violations, given the economic theory's problems, caution is required.").

101. *See* Connor & Lande, *supra* note 9, at 477 (arguing that "sanctions should be increased at least fivefold"); Thomas O. Barnett, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Global Antitrust Enforcement 3 (Sept. 14, 2006), *available at* http://www.justice.gov/atr/public/speeches/218336.pdf ("Because cartelists are capable of making a cost/benefit decision that discounts a possible fine as merely a cost of doing business illegally, cartel penalties not only should be large enough to negate financial incentives to conspire, but also should include substantial jail time for

Furthermore, the United States' practice of trebling cartel damages implies a detection rate of only thirty-three percent, which likely overstates the rate of detection.[102] Either way, many antitrust commentators agree that, despite increasing fines and prison sentences, the DOJ's cartel enforcement regime is sub-optimal and thus cartel formation remains under-deterred.[103]

### B. *Imprisoning Employees and Executives for Forming Cartels*

Some current and former government officials, including the Antitrust Division's primary enforcement attorneys, believe that white-collar defendants would pay almost anything to avoid prison.[104] Based on their experiences with such defendants, they argue that the threat of fines simply does not match incarceration's deterrent value.[105] And while a corporation can effectively indemnify the fines levied against its employees, only

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responsible individuals."); *see also* Werden et al., *supra* note 10, at 210 (characterizing cartels as having "no redeeming virtue").

102. *See* Robert H. Lande, *New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations*, 61 ALA. L. REV. 447, 486 (2010) (explaining that under the standard optimal deterrence model, "if only one-third of cartels are detected, convicted, and made to pay damages, then damages should be trebled to insure that collusion is not profitable"); Thomas A. Lambert, *Tweaking Antitrust's Business Model*, 85 TEX. L. REV. 153, 163 (2006) (reviewing HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION (2005)) ("The trebling of antitrust damages is designed to account for the fact that many violations (in theory, one-third) are not successfully prosecuted and punished.").

103. *See, e.g.*, Douglas H. Ginsburg & Joshua D. Wright, *Deterrence and Punishment in Antitrust: Antitrust Sanctions*, 8 COMPETITION POL'Y INT'L 46, 54 (2012) (stating that the "bulk of scholarly opinion is consistent with the view" that "cartel activity is currently under-deterred"); Lande & Davis, *supra* note 97, at 349 (commenting on the United States' "record of underdeterrence of anticompetitive conduct" such as cartels); Sokol, *supra* note 50, at 221 ("Neo-Chicago antitrust must design a better compliance model to achieve more optimal deterrence than currently exists in the DOJ cartel enforcement system.").

104. *See* Werden et al., *supra* note 10, at 229 ("We believe, however, that some antitrust defendants have spent more than $2 million in legal fees in the attempt to avoid prison and would pay much more in criminal fines to avoid jail altogether."); *see also* Connor & Lande, *supra* note 9, at 450 (describing the opinion of some that corporate officers would pay almost anything to avoid prison).

105. *See* Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527, 1568 (2011) (describing the DOJ's belief that fines are an inadequate deterrent to cartel formation and thus incarceration is necessary); Werden et al., *supra* note 10, at 213–14 ("[T]he proposition that a fine can achieve the same level of deterrence as a prison sentence is completely at odds with what prosecutors and counsel representing cartel defendants observe almost on a daily basis: individuals would gladly pay whatever they have to stay out of prison.").

the individuals themselves can serve prison sentences.[106] Hence the senior corporate executive's comment: "[A]s long as you are only talking about money, the company can at the end of the day take care of me—but once you begin talking about taking away my liberty, there is nothing the company can do for me."[107]

Furthermore, the reputational consequences of imprisonment similarly deter cartel participation. [108] One example of the concern expressed over such consequences came from Alfred Taubman, the former Chairman of Sotheby's, one of the world's two largest brokers of art, jewelry, real estate, and collectibles, along with its competitor, Christie's.[109] In the 1990s, Sotheby's and Christie's formed a bid-rigging cartel, which entailed meetings between Taubman and his counterpart at Christie's, Sir Anthony Tennant, as well as between their executives, respectively Diana "Dede" Brooks and Chris Davidge.[110] In December 2001, a New York federal jury found Taubman guilty of actively participating in the bid-rigging conspiracy.[111] In April 2002, Taubman was sentenced to one year

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106. *See* Werden et al., *supra* note 10, at 214 ("[T]he brunt of a prison sentence must be borne by the convicted individual, whereas a fine could be paid (if only indirectly) by others."); Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1151 n.193 (2009) (referring to the fact that "only natural persons" can be punished with some sentences, such as prison).

107. *See* Baker, *supra* note 1, at 306 (quoting anonymous friend of the author, a "senior corporate executive who would go on to become CEO of one of America's largest enterprises").

108. *See* Ginsburg & Wright, *supra* note 103, at 48 (discussing the reputational penalties imposed by the market on executives associated with cartel participation); Connor & Lande, *supra* note 9, at 449 n.95 (pointing out that an antitrust sanction can "decrease an individual's future income and lower their reputation and social status").

109. *See* Brenna Adler, *The International Art Auction Industry: Has Competition Tarnished Its Finish?*, 23 NW. J. INT'L L. & BUS. 433, 451–56 (2003) (summarizing the illegal practices by the two major auction houses between 1993 and 1999). *See generally* CHRISTOPHER MASON, THE ART OF THE STEAL: INSIDE THE SOTHEBY'S–CHRISTIE'S AUCTION HOUSE SCANDAL (2004) (chronicling the formation and eventual detection of the infamous auction house cartel).

110. *See generally* MASON, *supra* note 109 (chronicling the auction house cartel); Godfrey Barker, *The Fall of Dede Brooks*, TELEGRAPH.CO.UK (Jan. 6, 2001, 12:00 AM), http://www.telegraph.co.uk/culture/4720906/The-fall-of-Dede-Brooks.html (reporting on the story of Dede Brooks and her involvement in the auction house cartel).

111. *See* MASON, *supra* note 109, at 343–45 (describing Taubman's reaction to being found guilty of antitrust violations); Ralph Blumenthal & Carol Vogel, *Ex-Chief of Sotheby's Is Convicted of Price Fixing*, N.Y. TIMES, Dec. 6, 2001, at D6 (reporting on

and one day in prison, and ordered to pay US$7.5 million in fines.[112] Nonetheless, a few days before reporting to prison, Taubman lamented only over the damage to his reputation: "My name was very important to me all my life . . . . There's no question that it's been hurt badly."[113] Like many other executives, Taubman cared deeply about his reputation, and was strongly averse to anything that would tarnish it.[114] Taubman's punishment for participating in a cartel, however, likely would not have included a prison sentence if he had been prosecuted outside of the United States.[115]

### 1. The United States' Approach

The Antitrust Division has focused increasingly on imposing prison sentences against culpable individuals in cartel cases.[116] The rate of convicted cartelists sentenced to prison time in the United States increased from thirty-seven percent in the 1990s to eighty percent by 2009, with the average rate remaining

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Taubman's sixteen day trial in a Manhattan federal court, which eventually led to his conviction).

112. *See* MASON, *supra* note 109, at 359–60 (detailing the events surrounding the sentencing of Alfred Tuabman); Adler, *supra* note 109, at 453 ("On April 22, 2002, Taubman was sentenced to one year and one day in prison . . . .").

113. *See* MASON, *supra* note 109, at 370 (citing a July 29, 2002 conversation between the author and Alfred Taubman).

114. *See id.* at 298–99 (describing Taubman's desperate attempts to clear his name).

115. *Cf.* Connor & Lande, *supra* note 9, at 438 (pointing out that the United States is the only nation that incarcerates "significant numbers" of cartel managers); Shaffer & Nesbitt, *supra* note 2, at 324 (referring the DOJ's imposition of jail sentences as "almost unique").

116. *See* Dixon, *supra* note 47, at 83 ("In recent years . . . the DOJ has turned its focus toward efforts to dramatically increase the penalties for individual offenders and to pursue ever-greater numbers of individual targets in each case. The clear aim of this effort appears to be greater deterrence and harsher punishment of individual offenders."); Baker, *supra* note 1, at 309 (discussing the somewhat distinct nature of "American assumptions about the importance of criminal sanctions against individual wrongdoers"). Furthermore, in 2004, the US Congress passed the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), Pub. L. No. 108-237, 118 Stat. 665 (codified as amended in scattered sections of 15 U.S.C.), which, inter alia, increased the maximum prison sentence for cartel activities from three years to ten, and increased the maximum individual fine from US$350,000 to US$1 million. *See* Dixon, *supra* note 47, at 83 (noting that the passage of ACPERA was preceded by the Enron scandal).

above seventy percent for the 2010–2012 period.[117] Meanwhile, the average prison sentence increased from eight months in the 1990s to twenty months in the 2000s, and finally to twenty-five months for the 2010–2012 period.[118] In the 1990s, the total amount of prison time imposed on cartel managers throughout the entire decade was just over nine years, averaging less than one year of prison time sentenced per year.[119] Yearly totals, however, have recently soared to around seventy years imposed per year.[120] In 2007 alone, for example, the Antitrust Division secured over eighty-five years worth of prison sentences, partly because of the detection and prosecution of the vitamins cartel.[121] The 2012 total even surpassed even this record, as the Antitrust Division imposed more than ninety years of prison sentences on individual cartelists.[122]

The United States is also incarcerating, in US prisons, numerous non-US citizens for cartel participation.[123] In the

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117. *See* DOJ WORKLOAD STATISTICS, *supra* note 14, at 12 (providing detailed statistics regarding the Antitrust Division's prosecution history); Shaffer & Nesbitt, *supra* note 2, at 325 ("The 1990's saw an average of 37% of defendants involve a jail sentence, whereas the 2009 average was 80%."); *see also* Antitrust Division Spring 2013 Update, *supra* note 65 (showing seventy-one percent as the average rate of convicted cartelists sentenced to prison between 2010 and 2012).

118. *See* DOJ WORKLOAD STATISTICS, *supra* note 14, at 12 (providing year-by-year numbers on the Antitrust Division's incarceration of individual cartel defendants); Antitrust Division Spring 2013 Update, *supra* note 65 (graphing incarceration trends within the last two decades).

119. See Connor, *supra* note 6, at 92 (providing statistics and charts with information regarding increasing jail sentences levied against cartelists); Gibson Dunn Year End Review, *supra* note 65, at 6 (graphing the total amount of prison days sentenced to individual cartelists by the Antitrust Division).

120. *See* Gibson Dunn Year End Review, *supra* note 65, at 6 (charting data on the total number of prison days imposed on cartelists each year); *see also* DOJ WORKLOAD STATISTICS, *supra* note 14, at 12 (demonstrating the increasing numbers of incarceration since 2002).

121. *See* Connor, *supra* note 6, at 92 (providing year-by-year data on incarceration of cartelists in the United States); Hammond, *supra* note 7 (explaining the successes, as considered by Hammond, of the Antitrust Division's enforcement regime against the formation of cartels).

122. *See* Gibson Dunn Year End Review, *supra* note 65, at 6 (estimating that over forty individuals were sentenced to prison for antitrust violations, a new record).

123. *See* Shaffer & Nesbitt, *supra* note 2, at 325 ("Since May 1999, more than forty foreign defendants have served or are serving prison sentences in the United States for international cartel offenses or obstructing a cartel investigation."); Lee, *supra* note 83, at 55 (describing the United States' regime as a "strong" one that punishes corporations, as well as both US and non-US individuals, for their participation in cartels).

vitamins cartel case, for example, five non-US citizens served sentences in US prisons for their participation in the infamous cartel.[124] Since then, the Antitrust Division has frequently demanded that non-US citizens serve prison sentences as part of their negotiated settlements, and likewise states on its official website that the "[Antitrust] Division remains committed to ensuring that culpable foreign nationals, just like U.S. co-conspirators, serve prison sentences for violating the U.S. antitrust laws."[125] Over forty non-US cartelists are currently serving or have served prison sentences in the United States, including defendants from Austria, Belgium, Canada, France, Germany, Italy, Japan, Korea, Mexico, Norway, the Netherlands, Korea, Sweden, Switzerland, Taiwan, and the United Kingdom.[126]

Notwithstanding the deterrent value of incarcerating executives for cartel participation, the US practice has been criticized.[127] Some commentators have argued that there is an inherent loss to society when it is deprived of those executives' productivity.[128] On the other hand, Tefft Smith, a prominent

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124. *See* BROWN ET AL., *supra* note 17, § 7:89 (describing the non-US participants in the vitamins cartel and their resulting incarceration within the United States); Shaffer & Nesbitt, *supra* note 2, at 326 (describing the sanctions levied on the eleven executives that were charged in the vitamins cartel).

125. *See* FETTERMAN & GOODMAN, *supra* note 70, § 8:10 (describing the DOJ's procedure in prosecuting and negotiating with non-US citizens); Hammond, *supra* note 7 (describing current trends in the Antitrust Division's enforcement policies); *see also Antitrust Division Spring 2013 Update*, *supra* note 65 (stating that the pursuit of "foreign nationals" who participate in cartels involves "using all appropriate tools to find and arrest or extradite international fugitives where appropriate").

126 . *See* Scott D. Hammond, Deputy Assistant Att'y Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, The Evolution of Criminal Antitrust Enforcement over the Last Two Decades 7–8 (Feb. 25, 2010), *available at* http://www.justice.gov/atr/public/speeches/255515.pdf; Hammond, *supra* note 7, at 7.

127. *See generally* Ginsburg & Wright, *supra* note 103, at 60–69 (arguing that the Antitrust Division relies too heavily on incarceration, which has reached, or possibly even surpassed, its optimal level); Tefft W. Smith, Comments for the Antitrust Modernization Commission Hearing on Criminal Antitrust Remedies 5–9 (2005), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Smith_Statement.pdf (criticizing current DOJ incarceration policies).

128. *See* Stephan, *supra* note 9, at 536 ("Disqualifications also remove from the economy individuals who might otherwise be very capable managers with high value to an industry in terms of expertise."); Stucke, *supra* note 3, at 534 (mentioning the increasing social costs of executives "toiling away behind bars when they could be maximizing profits in the corporate world"); *see also* Ginsburg & Wright, *supra* note

antitrust defense lawyer, has criticized the Antitrust Division for not only imposing sentences that are too short, but also for overly prosecuting mid-level employees instead of the "willfully ignorant" executives.[129]

Furthermore, many convicted cartelists seem to be able to find employment after serving their sentences, sometimes even at the same companies where they formed cartels in the first place.[130] Two prominent antitrust scholars recently tracked down thirty-five managers who received prison sentences for cartel participation.[131] Of those managers, a quarter of them still work at the same companies, and another quarter work in the same industry.[132] In addition, of the four people that were fined but not imprisoned, two are working at the same companies and another is in the same industry.[133]

Professor Maurice Stucke, a Senior Fellow at the American Antitrust Institute, has also criticized the United States' increasingly severe incarceration policy.[134] Stucke notes that, faced with evidence that sanctions are sub-optimal, governments can either increase the probability of catching those cartels, which is very difficult, or, alternatively, can increase current sanctions.[135] If, however, cartels are under-deterred but specific

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103, at 70 (arguing that shorter jail-sentences are less detrimental to society than longer ones).

129. *See* Smith, *supra* note 127, at 1 ("Based on my perspective of 34 years as a criminal antitrust practitioner, I see the current state of criminal antitrust law and the Department of Justice's Antitrust Division enforcement policy as needing some statutory reform and agency refocus in several important respects."). *But see* Stucke, *supra* note 3, at 534 (referencing criticisms of the Antitrust Division's incarceration policy that less costly civil penalties, or shorter incarcerations, would suffice).

130. *See* Connor & Lande, *supra* note 9, at 441 (discussing corporate versus individual sanctions for cartel participation).

131. *See id.* (providing statistics regarding the re-hiring of individuals convicted of cartel offences).

132. *See id.* ("Of those 35, 9 (26%) are currently employed by the company for which they worked during the cartel, and another 9 (26%) seem to be working at a different company within the same industry.").

133. *See id.* at 442 (discussing the four people who received fines, but no prison sentences, during the period between 1995 and 2009).

134. *See* Maurice E. Stucke, *Reconsidering Competition*, 81 MISS. L.J. 107, 162 (2011) (arguing that increasing cartel sanctions above optimal levels can result in less innovation, raised prices, and less meaningful competition within the market).

135. *See id.* (discussing a government's options when faced with a cartel sanction regime that does not sufficiently deter the formation of cartels); *see also* Fleckinger et al., *supra* note 81, § 3.4 ("[C]orporate fraud can be dissuaded either by raising the

sanctions, like incarceration, are already at optimal levels, Stucke argues that increasing those sanctions would not be efficient. [136] Rather, governments must achieve optimal deterrence through a "pluralism of mechanisms," including new civil and criminal penalties, instead of increasing the penalties already in place.[137] In the United States, the rate and severity of incarcerations of individual cartelists can be significant, but whether they are in fact optimal and achieving a decrease in cartel formation and participation remains unclear.[138]

### 2. Other Jurisdictions' Approach

While United States' incarceration of cartelists can be frequent and severe, such punishment rarely occurs beyond US borders.[139] It is true that some jurisdictions, including Australia, Brazil, Canada, Thailand, Zambia, Japan, and many EU members, have adopted official policies authorizing the incarceration of cartelists.[140] In practice, however, it is rare that convicted cartelists in these jurisdictions actually serve prison sentences, even when their sentences include them.[141]

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average fine or by increasing the probability of detection, so that the expected fine is at least equal to the illicit profit generated by the fraud."); *supra* notes 97–103 and accompanying text (examining optimal deterrence theory in the realm of antitrust).

136. *See* Stucke, *supra* note 134, at 161 (stating that increasing specific antitrust penalties is a "problem . . . if the antitrust penalties are already at (or above) the optimal level").

137. *See id.* at 162 (criticizing the Antitrust Division for continuing to increase current penalties, rather than addressing the issues through "a pluralism of mechanisms"); *cf.* Fleckinger et al., *supra* note 81, § 3.4 ("[F]ixing a low probability of detection coupled with a high average fine is not optimal.")

138. *See* Sokol, *supra* note 50, at 202 ("Because the number of cartels remains unknown, it is difficult to determine if enforcers have achieved optimal deterrence."); *supra* notes 127–137 and accompanying text (presenting some arguments that increasing incarceration rates and sentences for cartelists is inefficient).

139. *See* Connor & Lande, *supra* note 9, at 438 (pointing out that the United States is the only nation that incarcerates "significant numbers" of cartel managers); Shaffer & Nesbitt, *supra* note 2, at 324 ("The United States, however, remains 'almost unique' when it comes to prison sentences: only Israel is another significant jurisdiction in that respect, followed by Japan.").

140. *See* Ginsburg & Wright, *supra* note 93, at 12 (pointing out that in a number of countries, "[p]enalties include not only corporate and individual fines but also jail sentences"); *see also* Shaffer & Nesbitt, *supra* note 2, at 320 ("In recent years, a wide range of other jurisdictions, at least formally, provide jail time for cartel offenses.").

141. *See supra* notes 84–94 and accompanying text (introducing the fact that many countries have formal policies that allow for the incarceration of individual cartelists, though they have not actually used them to incarcerate many cartelists).

In Canada, executives very rarely go to prison for participating in cartels.[142] For example, six Canadians were recently sentenced to serve a total of four and a half years in prison for their participation in a retail gasoline cartel.[143] Nevertheless, they were allowed to serve these sentences within their communities under so-called "conditional sentences," similar to house arrest, instead of in prison.[144] This trend may be about to change, however, considering recent amendments to Canada's Competition Act, which now prohibits conditional sentences for cartelists, essentially requiring price-fixers and bid-riggers to actually serve prison time.[145]

Meanwhile, in Australia, there has not been a single criminal prosecution since the commencement of its criminal regime in 2009, and Japan's Kōsei Torihiki Iinkai (Fair Trade

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142. *See* Lee, *supra* note 87, at 37 (pointing out that "only two countries have sent executives involved in cartels to jail (Canada and the U.S.)"); *cf.* Huy A. Do et al., *Canada: Cartel Regulation*, 2013 ANTITRUST R. AMS. 34, 36–37 (summarizing the recent cartel enforcement activities in Canada).

143. *See* Gibson Dunn Year End Review, *supra* note 65, at 21 (describing global development in cartel enforcement trends, with specific examples in Canada and elsewhere); List of Charges and Sentences in the Quebec Gasoline Price-fixing Cartel, CAN. COMPETITION BUREAU (Sept. 28, 2012), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03079.html (identifying the individuals involved in the Canadian retail gasoline cartel, the companies they worked for, and the sentences they received).

144. *See* Charges and Sentences in the Quebec Gasoline Price-fixing Cartel, *supra* note 143 (listing the individuals involved in the gasoline cartel, and showing that all of them, while sentenced to jail time, were eventually only sentenced to "imprisonment to be served in the community"); Gibson Dunn Year End Review, *supra* note 65, at 21 (stating that the individuals in the Canadian retail gasoline cartel were sentenced to serve time "in their communities").

145. *See* Kyle H. Donnelly & Randall T. Hughes, *No More House Arrest for Competition Act Offenders as Amendments Enter into Force*, MARTINDALE (Nov. 26, 2012), http://www.martindale.com/antitrust-trade-regulation-law/article_Bennett-Jones-LLP_1632158.htm (describing amendments to the Canadian Competition Act, amendments which "remove the availability of conditional sentences for those convicted of conspiracy or bid-rigging offences under sections 45 and 47 of the Competition Act"); Davies Ward Phillips & Vineberg LLP, Perspective: Canadian Government Restricts Availability of Conditional Sentences ("House Arrest") (Mar. 14, 2012), http://www.dwpv.com/~/media/Files/PDF/Perspective-Canadian-Government-Restricts-Availability-of-Conditional-Sentences-House-Arrest.ashx (describing a recent amendment in Canada's Competition Act, and the amendment's result that "an individual convicted and sentenced to prison under the Act's conspiracy provision (as well as bid rigging (s. 47), false or misleading representations (s. 52), and deceptive notice of winning a prize (s. 53) no longer has the ability to serve his or her sentence in the community").

Commission) has imposed criminal sanctions on cartelists less than once per year.[146] The UK Office of Trading has faced recent criticism for its inability to effectively prosecute cartelists when, in attempting to bring criminal charges in connection with the airline fuel surcharge cartel, it discontinued proceedings against four British Airways executives, acquitting all of them, because of prosecutorial errors.[147] Finally, in Brazil, thirty-four executives have been sanctioned with prison time for cartel activities, though their cases' appeals are still pending and it is unclear to what extent Brazil is actually enforcing their prison sentences.[148]

Some scholars have argued that these jurisdictions are less willing to incarcerate cartelists because of different cultural attitudes towards incarcerating white-collar defendants. [149] Various practitioners have also expressed concern that the increase in extraditions to the United States could likewise increase the extradition risk of US executives for criminal

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146. *See* Henry & Huett, *supra* note 48, at 21 ("At the time of writing, the DPP [Australia's Department of Public Prosecutions] had not commenced a criminal prosecution for cartel conduct."); Ishida & Hara, *supra* note 55, at 73 (describing the infrequency of incarcerating cartelists in Japan).

147. *See Trial Collapses of Four Senior British Airways Executives Accused of Price-Fixing with Virgin*, DAILY MAIL ONLINE (May 10, 2010, 9:07 AM), http://www.dailymail.co.uk/news/article-1276179/British-Airways-price-fixing-trial-collapses.html (reporting on the "[s]erious and significant failings by the Office of Fair Trading [that] led to the collapse of the case" against four British Airiways executives); OFT Press Release, British Airways to Pay £58.5 Million Penalty, *supra* note 73 (announcing recent developments in the prosecution of British Airways for its participation in the fuel surcharge cartel).

148. *See* Bruno L. Peixoto, *Brazil: Cartels & Leniency*, 2013 ANTITRUST R. AMS. 73, 76 (analyzing Brazil's anti-cartel regime and describing its criminal enforcement policies); Organisation For Economic Co-Operation and Development, Competition Law and Policy in Brazil: A Peer Review § 2.1.1.3 (2010), *available at* http://www.oecd.org/daf/competition/45154362.pdf (stating that while data on criminal prosecutions of cartels are "unfortunately" incomplete, the Brazilian Competition Policy System reports that of the ten individuals who received jail sentences for their part in a retail fuel cartel, "none of those sentences have been served to date, as all of the cases are on appeal").

149. *See* Shaffer & Nesbitt, *supra* note 2, at 335 ("Not all publics are convinced that cartel offenses merit the criminal penalty of jail time, which is advocated most vocally by the United States."); Baker, *An Enduring Divide*, *supra* note 11, at 158 (theorizing about the "social, political and judicial attitudes" that affect the "fundamentally different public perceptions about how evil cartels are and how seriously individual wrongdoers should be punished").

antitrust prosecution abroad.[150] Therefore, they warn, all businesses should account for "these growing risks" for executives worldwide.[151] Further, through coordination with Interpol, the Antitrust Division has even added indicted fugitive cartelists to the "Red Notice" list, an international most wanted list normally used for international terrorists and human rights violators.[152] Even with such international cooperation, though, the United States remains "almost unique" in its incarceration of individuals for cartel participation.[153]

### C. *Alternative Ways to Sanction Employees and Executives for Participating in Cartels*

While incarceration is a potent deterrent for executives contemplating cartel behavior, other types of sanctions can benefit cartel prosecution programs. For example, competition authorities have ordered individual cartel participants to remain under house arrest. Indeed, Dede Brooks, the CEO of Sotheby's who eventually testified against her boss, Alfred Taubman, was sentenced to six months of house arrest for her active participation in the auction house cartel.[154] Beyond these

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150. *See* Sokol, *Monopolists Without Borders*, *supra* note 45, at 57 (discussing cartel policy issues concerning the extradition of nationals for trial and incarceration in other jurisdictions). *See generally* Barry A. Pupkin & Iain R. McPhie, *Antitrust Extradition: An Emerging Risk*, ANTITRUST COUNS. (ABA Corp. Counseling Comm., Chicago, Ill.), July 2006 (describing the emerging risks to business executives for extradition based on anticompetitive behavior).

151. *See* Sokol, *Monopolists Without Borders*, *supra* note 45, at 57; Pupkin & McPhie, *supra* note 150.

152. *See* Thomas O. Barnett, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Global Antitrust Enforcement, Speech Before the Georgetown Law Global Antitrust Enforcement Symposium 4 (Sept. 26, 2007), *available at* http://www.justice.gov/atr/public/speeches/226334.pdf (speaking on policy developments of cartel enforcement trends); *see also* Laurence K. Gustafson et al., *Criminal Consequences of Anticompetitive Conduct*, 45 S. TEX. L. REV. 89, 96 (2003) (summarizing the various criminal consequences of anticompetitive conduct).

153. *See* Connor & Lande, *supra* note 9, at 438 (pointing out that the United States is the only nation that incarcerates "significant numbers" of cartel managers); Shaffer & Nesbitt, *supra* note 2, at 324 (referring the DOJ's imposition of jail sentences as "almost unique").

154. *See* MASON, *supra* note 109, at 366 (referencing Brooks' six-month home detention, which began on May 8, 2002); Alex Kuczynski, *When Home Is a Castle and the Big House, Too*, N.Y. TIMES, Aug. 18, 2002, at ST1 (characterizing Brooks as the "country's most visible felon serving home detention" and reporting on the fact that, even though under house arrest, she is allowed "to leave her 12-room, $5 million

traditional types of punishment, though, other sanctions can be used to deter individuals from forming cartels.

### 1. Debarment

Senior D.C. Circuit Judge Douglas H. Ginsburg and recently appointed Federal Trade Commissioner Joshua D. Wright have argued in favor of using debarment as a sanction for cartelists convicted in the United States.[155] Debarment, as they define it, is the prohibition of individuals from serving as officers, executives, or board members at any corporation for a set amount of time after they have been convicted of participating in a cartel.[156] In addition to its economic implications, debarment also acts as a deterrent because of its potential reputational repercussions.[157] Ginsburg and Wright argue that while there are inherent costs to society for imposing prison sentences, debarment costs less because it lacks the inherent loss to society from any imprisonment.[158] Currently, the United States has no specific debarment policy for competition law violators, though under the Sarbanes-Oxley Act, "unfit" persons are barred from serving as executives in publicly held companies, a prohibition that could theoretically include

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apartment for two hours each Friday to go grocery shopping at any store selling food or products related to food preparation").

155. *See generally* Ginsburg & Wright, *supra* note 103 (arguing for debarment of individuals convicted of cartel behavior); Joshua D. Wright—Biography, U.S. FED. TRADE COMM'N, http://www.ftc.gov/commissioners/wright/index.shtml (last visited Sept. 9, 2013) (noting that Wright was sworn in as a Federal Trade Commissioner on January 11, 2013, to a six-year term).

156. *See* Ginsburg & Wright, *supra* note 103, at 68 ("Clearly, the actual perpetrator should face the traditional criminal sanctions—jail and fines, to which we would add debarment."). While debarment can be used as a penalty against board members, officers, and high-ranking executives, the term "director" will be used as a term to refer to all of these individuals.

157. *See id.* at 70 ("The second and indirect advantage is that debarment enhances the likelihood and magnitude of the reputational sanction imposed by the job market."); Stephan, *supra* note 9, at 530 ("In particular, [disqualification or debarment orders] may damage reputation and adversely affect career and earning potential."); Werden et al., *supra* note 10, at 216 n.33 (referencing Ginsburg and Wright's assertion that debarment "enhances the reputational sanction imposed on convicted executives by shaming them").

158. *See* Ginsburg & Wright, *supra* note 103, at 70 ("Debarment also achieves its deterrent value at a lower social cost because an executive will be equally deterred by a long prison sentence or by a shorter prison sentence (which is less costly to society than is a longer one) and debarment (which is effectively costless to society.").

convicted cartelists. [159] Many other jurisdictions statutorily authorize debarment as a sanction for cartel behavior, including the United Kingdom, Australia, and Sweden.[160]

In June 2010, the British OFT announced its revised guidelines regarding director disqualification orders, "signaling its intent to use these sanctions to deter anti-competitive activity." [161] In the announcement, Cavendish Elithorn, the OFT's Senior Director of Policy and current temporary Executive Director, declared that "[t]he prospect of being disqualified as a director is one of the most powerful deterrents to anti-competitive behaviour across boardrooms and companies of all sizes."[162] The OFT has the authority to disqualify these

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159. The Sarbanes-Oxley Act, PL 107–204, § 305, 116 Stat 745 (codified as amended in scattered sections of 15 U.S.C. and 18 U.S.C.), amended, inter alia, both section 20(e) of the Securities Act of 1933 and section 21(d)(2) of the Securities Exchange Act of 1934 by substituting "substantial unfitness" with only "unfitness" in both, and thus lowering the standard of what qualifies as "unfit" for the purposes of publicly traded companies' managers. *See* Donald C. Klawiter & Jennifer M. Driscoll, *Sentencing Individuals in Antitrust Cases: The Proper Balance*, ANTITRUST, Spring 2009, at 75, 77 (arguing that if a company rehires, retains, or supports a "tainted executive," the company assumes the risk of "running afoul" of the Sarbanes-Oxley Act's "unfit" manager prohibition); Maria Camilla Cardilli, *Regulation Without Borders: The Impact of Sarbanes-Oxley on European Companies*, 27 FORDHAM INT'L L.J. 785, 799 (2004) ("Sarbanes-Oxley provides that an individual can, at the request of the SEC, be enjoined from serving as an officer or director of a public company if he or she is deemed 'unfit' for violating the general anti-fraud provisions of the securities laws."); *cf.* Sokol, *supra* note 50, at 235 ("[C]orporate boards are far more concerned with Sarbanes-Oxley compliance due to greater consequences for the board. . . . There is nothing analogous in antitrust.").

160. *See* Ginsburg & Wright, *supra* note 103, at 50 ("Debarment has already been authorized as a sanction for price-fixing in some countries, including the United Kingdom, Australia, and Sweden, and has been proposed by the Competition Commission of South Africa."); Press Release, U.K. Office of Fair Trading, OFT Sets Out Revised Approach to Director Disqualifications (June 29, 2010) [hereinafter OFT, Director Disqualifications Press Release], *available at* http://www.oft.gov.uk/news-and-updates/press/2010/68-10#.UUiK6XyDShY (announcing the OFT's publication of its planned use of director disqualification orders to deter anti-competitive activities).

161. *See* OFT, Director Disqualifications Press Release, *supra* note 160. *See generally* U.K. Office of Fair Trading, Director Disqualification Orders in Competition Cases: An OFT Guidance Document (2010) [hereinafter OFT Disqualification Guidelines], *available at* http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft510.pdf (offering guidance to companies regarding the OFT's new director disqualification order procedures).

162. *See* OFT, Director Disqualifications Press Release, *supra* note 160 (quoting Cavendish Elithorn, the OFT's then-Senior Director of Policy); *see also* OFT Press Release 61/13 (Sept. 5, 2013), *available at* http://www.oft.gov.uk/news-and-

directors under the United Kingdom's Company Directors Disqualification Act of 1986 ("CDDA") and the Enterprise Act of 2002.[163] Specifically, sections 188 through 190 of the Enterprise Act, which amended the CDDA, make cartel participation an indictable offence under the CDDA.[164]

According to the OFT guidelines, the CDDA, as amended by the Enterprise Act, requires a court to make a competition disqualification order ("CDO") against an individual if two conditions are met: (1) a company of which that individual is a director commits a breach of competition law; and (2) the "court considers that person's conduct as a director makes him or her unfit to be concerned in the management of a company."[165] CDOs can only be made against directors, although this includes any individual that acts as a director, regardless of their official title.[166] Under section 9A(9) of the CDDA, a CDO's disqualification period can be no longer than fifteen years.[167] During this period, it is a criminal offense for the disqualified individual to be a director of a company; act as a

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updates/press/2013/61-13#.Ui1Sl2SDR7M (announcing the appointment of Elithorn as an Executive Director, on temporary promotion).

163. *See* Company Directors Disqualification Act, 1986, c. 46, § 9, sch. 1 (U.K.); Enterprise Act, 2002, c. 40, § 204 (U.K.); *see also* Spencer Weber Waller, *Corporate Governance and Competition Policy*, 18 GEO. MASON L. REV. 833, 865–66 (2011) (explaining that, similar to the United States' Sarbanes-Oxley Act prohibitions, the OFT Disqualification Guidelines attempt to regulate the fitness of those that run companies in the United Kingdom).

164. *See* Enterprise Act §§ 188–90 (making the participation in or formation of cartels an indictable offence under the Company Directors Disqualification Act ("CDDA")); OFT Disqualification Guidelines, *supra* note 161, para. 4.28 ("Where a company director has been convicted of the cartel offence under section 188 Enterprise Act 2002 and that offence has been committed in connection with the management of a company, the convicting court has the power to make a disqualification order against that individual director.").

165. See OFT Disqualification Guidelines, *supra* note 161, para. 2.1 (explaining court procedures required for director disqualification orders under the CDDA).

166. *See id.* para. 2.3 & 5 n.6 (citing Company Directors Disqualification Act, c. 22, § 4) (explaining that, for the purposes of director disqualification orders, "'Director' includes any person occupying the position of director, by whatever name called," including both "de facto directors" and "shadow directors"); *see also* Re Hydrodam (Corby) Ltd., [1994] 2 B.C.L.C. 180, 183 (U.K.) (defining "shadow directors," as those "person[s] in accordance with whose directions or instructions the directors of the company are accustomed to act").

167. *See* Company Directors Disqualification Act § 9A, sch. 1; OFT Disqualification Guidelines, *supra* note 161, para. 2.10 ("The maximum period of disqualification under a CDO is 15 years.").

receiver of a company's property; be concerned in or take part in the promotion, formation, or management of a company in any way, whether directly or indirectly; or act as an insolvency practitioner.[168]

When determining whether a director's conduct "makes him or her unfit to be concerned in the management of a company," both the OFT and the reviewing court must determine whether the director contributed to the breach of competition law, did not contribute to the breach but had reasonable grounds to suspect a breach and took no steps to prevent it, or, alternatively, did not know but "ought to have known" that there was a breach.[169] In making this determination, the court may also consider any other breaches of competition law to which the director is connected.[170] When determining if the lowest threshold has been met—whether the director "ought to have known" of the breach—the OFT, according to its guidelines, is likely to consider the following: the director's role in the company, including his specific position and responsibilities; the relationship of the director's role to those responsible for the breach; the general knowledge, skill, and experience actually possessed by the director in question and that which should have been possessed by a person in his or her position; and/or the information relating to the breach that was available to the director.[171] Moreover, the guidelines state that even though the OFT presumes that all directors are aware of the illegality of cartel behavior, the mere fact that directors are also responsible for competition law compliance does not itself create a presumption that the director ought to have known of a breach occurring within the

168. OFT Disqualification Guidelines, *supra* note 161, para. 2.10 (explaining what is prohibited under CDOs); *see* Company Directors Disqualification Act § 1(1) (criminalizing certain activities for individuals that have been ordered to adhere to a CDO).

169. *See* OFT Disqualification Guidelines, *supra* note 161, para. 2.9 (listing the factors that should be considered by a court when determining whether to make a CDO).

170. *See id.* (explaining that the reviewing court "may have regard to his conduct as a director of a company in connection with any other breach of competition law").

171. *See id.* para. 4.22 (outlining what the OFT will likely consider when determining whether a director "ought to have known" of a breach of competition law within their company).

company.[172] Despite the fact that these guidelines were released more than two years ago, the OFT has not imposed a single CDO in connection with an anti-competitive cartel.[173]

Meanwhile, in the United States, Scott Hammond, along with Gregory Werden and Belinda Barnett, respectively the Antitrust Division's Senior Economic Counsel and Deputy General Counsel, have criticized debarment, specifically addressing Ginsburg and Wright's proposal.[174] Their primary disagreement concerns the potential use of debarment to shorten prison sentences.[175] These Antitrust Division attorneys believe that only meaningful incarceration can reliably deter

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172. *See id.* para. 4.23 ("[T]he fact that a director is responsible for ensuring competition law compliance within a company will not itself expose that director to an increased risk of CDO proceedings should a breach of competition law occur, or create a presumption that the director ought to have known about any breach that occurs."); *see also* U.K. Office of Fair Trading, Company Directors and Competition Law para. 2.10 (June 2011), http://www.oft.gov.uk/shared_oft/ca-and-cartels/competition-awareness-compliance/oft1340.pdf (explaining that the threat of a CDO is a "direct individual incentive" on directors "to be committed to ensuring that their company has an effective competition law compliance culture").

173. The OFT has completed only five criminal cartel cases. *See* Completed Criminal Cartel Cases, U.K. OFFICE FAIR TRADING, http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/criminal-cartels-completed/#.UjpJqmSDR7M (last visited Sept. 18, 2013) (listing the OFT's five completed criminal cartel cases, which investigated collusion in the marine hose, agricultural, airline fuel surcharge, automotive, and commercial vehicle manufacturing sectors). Only in one of these, however, did defendants actually receive sentences: the marine hose cartel. *See id.* (showing that the other four cases were closed because of insufficient evidence). Although three of the marine hose defendants were sentenced with, inter alia, disqualification orders, these disqualifications are not actually cartel-related CDOs, as they were imposed under a separate disqualification provision under the CDDA. *See* Stephan, *supra* note 9, at 532 ("The three individuals who were imprisoned in the *Marine Hoses* case received disqualifications under the separate provision contained in [the] CDDA . . . ."). The OFT also explicitly stated two years after the marine hose prosecution that the OFT "[had] not used its CDO powers to date." *See* U.K. Office of Fair Trading, Director Disqualification Orders in Competition Cases: Summary of Responses to the OFT's Consultation, and OFT's Conclusions and Decision Document para. 2.6 (May 2010), http://www.oft.gov.uk/shared_oft/consultations/oft1244.pdf (offering explanations for the lack of CDO implementation).

174. *See* Werden et al., *supra* note 10, at 215–16 (addressing the proposal of using debarment as a deterrent for cartel formation).

175. *See id.* ("The specific suggestion is to shorten prison sentences, hence reducing the cost of imposing the sanction, and to add a substantial term of disqualification after the prison sentence is served.").

cartel participation, and that "a lifetime term of disqualification might provide less deterrent punch than a year in prison."[176]

Other scholars, however, are more supportive of debarment. John Connor, a Senior Research Fellow at the American Antitrust Institute, and Robert Lande, the Director of the American Antitrust Institute, argue that negotiated plea agreements should include clauses prohibiting individuals from returning to the same corporations where they committed their crimes.[177] Spencer Weber Waller, Director of the Institute for Consumer Antitrust Studies at Loyola University Chicago School of Law, cautions that while debarment policies could be helpful, they would have to be done on an administrative, as opposed to legislative, level, because of how politically challenging passing debarment legislation would be.[178] Still, the issue of whether the Antitrust Division should use debarment as a sanction is now an important conversation occurring among antitrust scholars and practitioners.[179]

### 2. Earnings Forfeiture

Asset or earnings forfeiture has been used as a sanction for various economic crimes throughout numerous jurisdictions.[180] For example, Nicholas Cosmo, who was recently indicted for operating a several-hundred-million-dollar Ponzi scheme through his company Agabe World, Inc., agreed to an asset forfeiture judgment in the amount of US$400 million on top of

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176. *See id.* at 216 (noting that the deterrent effect of disqualification stems from "its tendency to deny the offender substantial income").

177. *See* Connor & Lande, *supra* note 9, at 483 (referring to Ginsburg and Wright as "some of the most respected members of the antitrust community").

178. *See* Waller, *supra* note 163, 866–67 (proposing several ways to, according to the author, improve both antitrust and corporate compliance law).

179. *See supra* notes 155–178 and accompanying text (outlining the varying practices and opinions on debarment as a sanction for cartel participation).

180. *See* Alice W. Dery, *Overview of Asset Forfeiture*, 2012 BUS. L. TODAY 1, 1 ("By going after the money [a white-collar defendant] generated from his fraud, forfeiture takes away the principal incentive for the crime and punishes the criminal for his illicit conduct where it hurts most."). *See generally* Mary Kreiner Ramirez, *Criminal Affirmance: Going Beyond the Deterrence Paradigm to Examine the Social Meaning of Declining Prosecution of Elite Crime*, 45 CONN. L. REV. 865, 867 (2013) (discussing some traditional theories surrounding the sanctioning of "elite crimes," including asset forfeiture).

his twenty-five year prison sentence.[181] Moreover, the Southern District of New York found the infamous Bernard Madoff personally liable for the US$170 billion in proceeds he obtained from his Ponzi scheme.[182]

In the United States, the DOJ has the legal authority to seize all of the proceeds obtained from criminal activities.[183] Corporate directors risk criminal charges and asset forfeiture for, among other things, hiring illegal immigrants.[184] Moreover, asset forfeiture was used a few decades ago in response to the insider trading scandals that marred Wall Street in the 1980's.[185] Outside the United States, Russia's Criminal Code specifically authorizes seizing individuals' income derived from anti-competitive conduct.[186] Similarly, courts in the United Kingdom

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181. *See* Robert Chew, *Another Ponzi Scheme? Money Manager Cosmo Busted*, TIME (Jan. 27, 2009), http://www.time.com/time/business/article/0,8599,1874283,00.html (reporting on the arrest of Nicholas Cosmo for running a Ponzi scheme); *Financial Crimes Report to the Public*, FBI, http://www.fbi.gov/stats-services/publications/financial-crimes-report-2010-2011 (last visited Mar. 20, 2013) (providing an overview of significant cases of financial crime involving asset forfeiture judgments).

182. *See* United States v. Bernard, 09 Cr. 213 (DC), (S.D.N.Y. June 26, 2009), (Preliminary Order of Forfeiture finding Madoff guilty of operating a Ponzi scheme and personally liable for all the proceeds he obtained from it); *Madoff Ordered to Forfeit More than $170 Billion*, FOX NEWS (June 27, 2009), http://www.foxnews.com/story/0,2933,529223,00.html#ixzz2O8uQXKoM ("Disgraced financier Bernard Madoff must forfeit $170 billion, a federal judge ordered Friday.").

183. *See* U.S. Dep't of Justice, *National Asset Forfeiture Strategic Plan 2008-2012*, at 3, *available at* http://www.justice.gov/criminal/afmls/pubs/pdf/strategicplan.pdf (forward from the assistant Attorney General).

184. *See* Maya Elbert, *Developments in the Executive Branch: ICE Establishes Image Program*, 20 GEO. IMMIGR. L.J. 717, 719 (2006) (discussing developments in the US Executive Branch's powers in relation to immigration policy).

185. *See* David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L.J. 1, 3 (2012) (referencing the "renewed emphasis" on forfeiture in the 1980s); Lisa H. Nicholson, *Sarbanes-Oxley's Purported Over-Criminalization of Corporate Offenders*, 2 J. BUS. & TECH. L. 43, 56–57 (2007).

186. *See* KESSLER & WALLER, *supra* note 6, § 5:18 ("Under the amendments to Article 178 of the Criminal Code, violations of antitrust laws could be punishable by a sentence of up to six years in prison depending on the number of antitrust violations within a certain period of time, the amount of income derived from the anticompetitive conduct, and the damage inflicted upon competitors."); FAS Russia's Officers Received Training at Polish Competition Authority, FED. ANTIMONOPOLY SERVICE, RUSS. FED'N, http://en.fas.gov.ru/news/news_31025.html (last visited Mar. 20, 2013) (providing limited information regarding competition laws in Russia).

are authorized to impose forfeitures or seize assets as a punishment for unfair labor practices.[187]

Under the US Federal Sentencing Guidelines, antitrust and white-collar crimes are treated as "serious" offences.[188] Sherman Act violators thus could possibly face, among other things, forfeiture of the assets derived from cartel participation.[189] But while asset forfeiture is statutorily authorized, its use depends on whether agencies actually employ it, which has not occurred in the United States.[190]

The fines levied on individual cartelists, however, have been relatively small compared with corporate fines, as the Antitrust Division has focused its individual deterrence regime on incarceration.[191] Since the vitamins cartel, the average fine levied on individual cartelists has been approximately US$85,000, with the yearly average dropping as low as US$22,000 in FY 2009.[192] Meanwhile, the average corporate fine in the same time period was almost US$50 million.[193]

Around the world, competition authorities have focused more and more on breaking up and preventing the formation of international cartels. Most authorities are heavily fining

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187. *See* Timothy J. Bucher, *London Bridges Falling Down: How Conflicts Between U.S. and European Law May Derail the NBA's Move to Europe*, 11 VA. SPORTS & ENT. L.J. 377, 393 (2012) (discussing the intersections of competition law and labor law within the professional sports context).

188. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(4)(d) (2010) ("[E]conomic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, [] in the Commission's view are 'serious.'"); *see also* Gregory J. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime*, 5 EUR. COMPETITION J. 19, 21–22 (2009) (addressing the 1987 Guidelines, the antitrust language of which is very similar to the 2010 Guidelines, and stating that "[s]entences in the guidelines were designed to achieve deterrence, and the antitrust guideline provided significantly greater sanctions for cartel activity than had been the norm" at the time); Ray S. Bolze et al., *Antitrust Law Regulation: A New Focus for a Competitive Energy Industry*, 21 ENERGY L.J. 79, 84 (2000) (explaining the severe consequences of violating the Sherman Act).

189. *See* Bolze et al., *supra* note 188, at 84 (describing the "severe" penalties for violating provisions of the Sherman Act); *see also* Werden, *supra* note 188, at 28–29 (arguing that cartel activity requires serious sanctions).

190. *See* Ramirez, *supra* note 180, at 920 (arguing for the necessity to reexamine the United States' financial crime prosecution regime).

191. *See supra* notes 116–38 (explaining the Antitrust Division's strong emphasis on incarceration as a sanction for cartel behavior).

192. *See* DOJ WORKLOAD STATISTICS, *supra* note 14, at 11 (charting the Antitrust Division's case results from 2002 to 2011).

193. *See id.*

corporations caught participating in cartels. Many authorities are also focusing on individual sanctions and deterrence, though the United States stands almost alone in its practice of incarcerating those individuals. Meanwhile, other authorities like the United Kingdom's OFT have indicated that they plan to use disqualification or debarment sanctions against these white-collar criminals, though they do not appear to have done so yet. While most authorities try to deter individual cartel behavior with fines, they have not done so by specifically calibrating those fines to all of the earnings those individuals gained during their employment.

## III. *DEFEATING THE "SUPREME EVIL"*[194]*: MAKING THE PUNISHMENT FIT THE CRIMINAL*

The formation of and participation in anti-competitive cartels remains under-deterred, and thus the overall level of sanctions imposed on individuals for participating in cartels must be increased.[195] Rather than increasing prison sentences, as the Antitrust Division has done in the past, the Division should use other sanctions, specifically the debarment of directors and executives and the forfeiture of all earnings derived from individual cartelists' employment at their companies.[196] Part III.A argues that competition authorities should debar or disqualify all directors and executives that, knowingly or negligently, supervise a company that is caught participating in a cartel. Part III.B, meanwhile, supports direct earnings forfeiture as a sanction for executives and employees that actively participate in cartels.

For directors and executives, reputational consequences are of paramount concern, and thus competition authorities should embrace the debarment of those that supervised a company during its cartel activity.[197] When these directors also actively

194. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408 (2004) (referring to cartels as the "supreme evil of antitrust").

195. *See supra* note 103 and accompanying text (discussing the fact that many antitrust commentators agree that the formation of cartels remains under-deterred).

196. *See supra* notes 116–38 (explaining the Antitrust Division's continuing increase of incarceration as a sanction for cartel participation).

197. *See supra* notes 108–15 and accompanying text (discussing the reputational consequences individuals feel as a result of cartel sanctions).

participate in cartels, as in the case of Alfred Taubman, authorities should, in addition to debarment and incarceration, seize all salaries and bonuses those directors received from the company since it formed or joined the cartel.[198] Moreover, employees who actively participate in the cartel, such as Dede Brooks, should also have all of their earnings similarly seized by authorities.[199] For governments that already authorize their authorities to seize assets from white-collar criminals, as in the United States, legislation would not be necessary; instead, competition authorities would only need to update their policies to include earnings forfeiture.[200] Regarding debarment, the Antitrust Division should use it against directors of companies that are caught participating in cartels, even when they were not actively participating in the anti-competitive activities.[201] Moreover, in jurisdictions where competition authorities are already legally authorized to use debarment, authorities should start actually using the authority.[202]

### A. *Reputational Damage: Incentivizing Stronger Corporate Compliance by Threatening Directors with Debarment*

When directors, especially "willfully ignorant" ones, supervise a corporation that participates in a cartel, they should be disqualified from serving on other boards, akin to Ginsburg and Wright's proposal and the United Kingdom's (unenforced) CDO practice.[203] Directors and officers who supervise a company where cartel behavior occurs should be sanctioned for not

198. *See supra* notes 109–15 and accompanying text (describing Alfred Taubman's active participation in the auction house cartel).

199. *See supra* notes 109–15, 180–93 and accompanying text (describing the Dede Brooks' active participation in the auction house cartel, as well as asset forfeiture practices around the world).

200. *See supra* notes 183–85 and accompanying text (explaining that the DOJ has the authority to seize assets or earnings for antitrust violations).

201. *See supra* notes 155–79 and accompanying text (discussing debarment as sanction for individuals who participate in cartels).

202. *See supra* notes 160–73 and accompanying text (discussing debarment in jurisdictions outside of the United States, and the fact that they are not actually using the sanction against individuals caught participating in cartels).

203. *See supra* notes 129, 155 and accompanying text (discussing the insufficient punishment for "willfully ignorant" executives whose companies participate in cartels, and Ginsburg and Wright's proposal regarding debarment of executives).

effectively monitoring and stopping it.[204] Implementing this as the common sanction, along with corporate fines, would increase the incentives for these directors to strengthen internal antitrust compliance structures.[205]

The Antitrust Division's policy should sanction all directors and officers with disqualification orders like the OFT's CDOs when their company is caught participating in a cartel.[206] The Division's policy should impose a standard as low as, or even lower than, the OFT's "ought to have known" liability standard.[207] For example, the Division should not give the directors of cartelist corporations the benefit of presumption that the OFT grants UK directors.[208] Whereas the OFT does not presume that a director "ought to have known" of the cartel within his or her company simply because their compliance procedures were ineffective, the Antitrust Division should hold a rebuttable presumption that directors "ought to have known" of their company's cartel participation.[209] This sanction would deter not only active participation in cartels, but would also increase the efforts of directors to prevent cartel behavior within their companies.

Like incarceration, debarment can have severe reputational consequences.[210] Further, directors that actively participate in cartels, such as Alfred Taubman, are incentivized to implement

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204. *See supra* notes 80–82 and accompanying text (discussing the goal of corporate fines as incentivizing strong antitrust monitoring and compliance programs that effectively prevent anti-competitive activities within the company).

205. *See supra* notes 80–82 and accompanying text (commenting on the structuring of sanctions so as to incentivize internal monitoring and compliance with antitrust laws).

206. *See supra* notes 161–73 and accompanying text (explaining the OFT Disqualification Guidelines, specifically the use of CDOs).

207. *See supra* notes 169–72 and accompanying text (explaining the OFT's "ought to have known" standard regarding directors' liability for their companies' cartel participation).

208. *See supra* note 172 and accompanying text (discussing the fact that the OFT Disqualification Guidelines do not create a presumption that a director "ought to have known" of his or her company's illicit conduct just because their compliance programs were, in the end, unsuccessful).

209. *See supra* note 172 and accompanying text (describing the benefit of the presumption that directors receive in the United Kingdom).

210. *See supra* notes 108–15 and accompanying text (discussing the reputational consequences directors, such as Alfred Taubman, feel as a result of cartel sanctions and their corresponding stigma).

effective compliance programs only through prison sentences and corporate fines, the latter of which is an indirect deterrent.[211] To incentivize stronger internal compliance more directly, the people that control companies must be sanctioned when their compliance programs are negligently insufficient. This type of sanction could be implemented without shortening prison sentences, the concern expressed by Antitrust Division attorneys, and could even more effectively deter cartel participation by sanctioning the negligent executives that currently face no liability beyond fines. [212] For actively participating executives, debarment can be coupled with incarceration, akin to probation.

Debarment would also increase the effectiveness of leniency programs. [213] When directors uncover their company's participation in a cartel and are considering their next step, they will not only have the threat of corporate fines to consider, but will also face the threat of losing their ability to serve on other corporate boards, as well as the reputational consequences.[214] Rather than only considering the corporate consequences when deciding whether to approach competition authorities for leniency, directors will also have to consider their careers and reputations, and thus will have all the more reason to "race to the prosecutor's door."[215] The Division should make it clear that, for any company caught participating in a cartel, the company's directors face a real threat of debarment or disqualification.

Furthermore, the Antitrust Division could then offer any organization's directors the opportunity to avoid disqualification by cooperating with the Division, even when it is not the first

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211. *See supra* notes 80–82 and accompanying text (explaining that the goal of corporate fines is to incentivize directors to implement strong antitrust monitoring and compliance programs within their companies).

212. *See supra* notes 174–76 and accompanying text (discussing Hammond, Werden, and Barnett's hesitation about Ginsburg and Wright's proposal because of its support for shorter prison sentences for individual cartelists).

213. *See supra* notes 47–62 and accompanying text (examining leniency programs and their positive effects for the detection and prosecution of cartels).

214. *See supra* notes 47, 108–15 and accompanying text (discussing the reputational consequences directors of cartel).

215. *See supra* note 46 and accompanying text (referring to the "race-to-the-prosecutor's door" mentality that has successfully fueled leniency programs around the world).

corporation to do so. This policy would encourage almost every cartel participant to eventually cooperate with the Division. Even though these companies would still pay large corporate fines for their illegal activities, the people that would decide whether to approach the Division would have direct individual incentives to do so.[216] Other competition agencies should do the same.

While the Antitrust Division does not have the statutory authority to debar these board members, it can still employ it in negotiated settlements. Furthermore, the US Congress should amend current antitrust regulation law so as to allow debarment judgments for individual cartelists, just as other jurisdictions have done. Meanwhile, these other jurisdictions should actually use their power to debar individual cartelists.

Debarment should be the standard of any cartel prosecution regime. Corporate fines are designed as indirect incentives for shareholders and boards of directors to monitor the company's employees and prevent anti-competitive behavior.[217] This same reasoning should be used for debarment. If directors know that they could be debarred, they will surely put more effort into monitoring their own employees so as to prevent the formation of cartels.

### B. *The Loss from Doing Business: Deterring Active Participation with the Threat of Earnings Forfeiture*

In order to structure fines that effectively deter individuals from actively participating in cartels, competition authorities should seize all salaries and bonuses earned during the period in which the individual engaged in cartel behavior. This policy, however, should only apply to those individuals who actively participate in the cartel, like Alfred Taubman and Dede Brooks. [218] All directors, board members, executives, and employees should be held to similar standards in determining "active" participation. Indeed, such a sanction would deter

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216. *See supra* notes 63–78 and accompanying text (discussing the significant fines levied on corporations for participating in cartels).

217. *See supra* notes 80–82 and accompanying text (explaining how corporate fines incentivize internal monitoring programs).

218. *See supra* notes 109–15, 154 and accompanying text (discussing the active participation of Alfred Taubman and Dede Brooks in the auction house cartel).

individuals at every corporate level from actively participating in cartels.

The economic sanctions for individual cartelists remain relatively low compared with other types of cartel sanctions.[219] As cartels are currently under-deterred, these low sanctions are one of the most sensible ones to increase.[220] The benefit of earnings forfeiture sanctions is that they are in direct accordance with optimal deterrence theory.[221] Employees that actively engage in cartel behavior would lose the direct benefits from their employment. Finally, forfeiture sanctions would help destabilize cartels by increasing the consequences of losing the leniency "race" to the other co-conspirators.[222]

Even though it has the statutory authority to do so, the Antitrust Division does not use earnings forfeiture as a sanction for cartelists as other DOJ divisions currently use it for similar financial crimes.[223] The Division should take advantage of its authority and wield this sanction to punish and deter anyone from actively participating in a cartel. Other jurisdictions, meanwhile, should likewise follow suit.

## *CONCLUSION*

Some competition agencies, like the Antitrust Division, have focused their anti-cartel regimes on deterring individuals. Divergent views exist, however, on whether to incarcerate individuals for engaging in cartel behavior. The threat of incarceration likely is the most effective form of deterrence for

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219. *See supra* notes 191–93 and accompanying text (discussing the fact that individual economic sanctions are relatively small compared with the severity of corporate fines and other individual sanctions like incarceration).

220. *See supra* note 103 and accompanying text (summarizing many antitrust commentators' arguments that, despite the increasing sanctions for cartel participation, the formation of cartels is still under-deterred).

221 . *See supra* notes 97–103 and accompanying text (explaining optimal deterrence theory and its important role in antitrust policy).

222. *See supra* notes 58–62 and accompanying text (explaining that leniency programs are made more effective by harsher consequences for not applying for leniency).

223. *See supra* 180–83, 188–90 and accompanying text (explaining that the DOJ has the statutory authority to seize assets for financial crimes, and has done so severely in the case of, for example, Ponzi schemes, but that the Antitrust Division has not specifically targeted the earnings that individuals have derived from their anti-competitive activities).

cartelists, but that does not mean that it should be the only one. Competition authorities should also embrace debarment and earnings forfeiture to fight against this "supreme evil."