

CPI's Cartel Column Presents:

On the Alleged Disproportionate Sentencing of Cartel Managers: A Response to Professor John M. Connor

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September 2016



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Professor Connor published an article in the CPI Cartel Column recently¹ taking issue with comments we had made in the Nikkei Asian Review.² Whilst we have great respect for such a widely-published economist, and note that his article includes some interesting observations, Professor Connor's sensationalist characterization of our comments requires correction. We also question some of the points Professor Connor makes in his article.

Enforcement Policy Not Sentencing Discrimination

The statistics presented by Professor Connor focus on the lengths of prison sentences and amounts of fines imposed on foreign cartel managers compared to their U.S. counterparts. He contends that the evidence shows there is no discrimination and, indeed, that foreigners were treated more leniently.

It may be that this conclusion is correct. We do not have the data to say one way or the other. As interesting as it may be, however, it does not respond to any point we made in our article. Readers will search in vain for any suggestion in our article that there has been sentencing discrimination in the sense that foreigners have been sentenced more harshly than U.S. citizens for participation in cartels. The quote from our piece which Professor Connor included in the introduction to his article, and which might appear to suggest we were alleging such discrimination, has been taken out of context and goes to a rather different point (to which we will return below).

Our article was not about sentencing discrimination but about enforcement policy. The statistics we presented, which Professor Connor has not challenged, were on the number of foreigners convicted for cartel offences and, in particular, about how those numbers have grown both proportionately and in absolute terms over the last 20 years.

The phenomenon we described is not something that just arose from anecdotal evidence on the *Auto Parts* cartel, as Professor Connor suggests, but is the consequence of a deliberate, acknowledged shift in U.S. Government policy in the 1990s³ - the start of what Professor

¹ John M. Connor. On the Alleged Disproportionate Sentencing of Cartel Managers. Competition Policy International, CPI Cartel Column (August 2016).

² Ankur Kapoor, Douglas E. Rosenthal, Richard Pike, James Ashe-Taylor, and Yoshitaka Kato. US criminal antitrust implicating Japanese at alarming rate: Commentary. Nikkei Asian Review (June 27, 2016). [Available at: <http://asia.nikkei.com/Politics-Economy/Policy-Politics/Kapoor-and-Rosenthal-US-criminal-antitrust-implicating-Japanese-at-alarming-rate?page=1>]

³ Scott D. Hammond. Charting New Waters in International Cartel Prosecutions. Department of Justice (US) – Antitrust Division, March 2, 2006. [Available at: <http://www.justice.gov/atr/file/518446/download>]

Connor refers to as a “*campaign against international cartels*”. The whole point of our article was to start a debate about this shift in policy.

Proportionality Is An Issue, Just Not In The Way Described

One of the reasons we have taken issue with U.S. criminal enforcement against international cartels is because we believe that the punishments imposed are unjustly severe and disproportionate. Professor Connor is right in that respect. The reasons why we think the punishments are disproportionate, however, are not as he describes.

As already noted, our complaint is not about discrimination in sentencing but about enforcement priorities. We consider the punishments inflicted on foreign cartel managers to be severe and disproportionate mainly because other business misconduct having a worse impact on consumers is treated much more leniently. The comparisons we drew were with the treatment of those responsible for the financial crisis and for the GM ignition-switch scandal. That was the point we were making in the text quoted by Professor Connor in his introduction; when we said that “*Japanese businesspeople have... received harsher treatment compared to other perpetrators of similar or worse misconduct*”, we were making a comparison between the treatment of antitrust violations and other business misconduct referenced in the text that followed.

We additionally questioned whether the punishments imposed could be considered appropriate even if other business misconduct was treated similarly. We noted in this respect that new academic research shows there is little public support for the imprisonment of cartel managers, even in the United States.⁴ With a higher per capita rate of imprisonment than any other country in the world (except the Seychelles),⁵ perhaps the U.S. is just too ready to impose jail-time.

Professor Connor has not addressed either of those points. His database presumably does not allow a comparison between the treatment of cartels and other business misconduct, and perhaps he does not have any interest in what the public thinks about the punishments imposed.

⁴ Andreas Stephan. Survey of Public Attitudes to Price Fixing in the UK, Germany, Italy and the USA. CCP Working Paper 15-8, July 2015. [Available at <http://ssrn.com/abstract=2642181>.]

⁵ Institute for Criminal Policy Research. World Prison Brief 2016. [Available at http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All&=Apply].

International Comity

We also took issue with U.S. criminal enforcement against foreigners on the grounds of international comity. It seems to us that there are good reasons for treading cautiously in the exercise of extra-territorial jurisdiction, especially criminal jurisdiction.

As the U.S. reaction to the European Commission's recent Apple tax ruling has shown, no-one likes to see a foreign power imposing stringent "penalties" on their businesses or citizens. Aggressive enforcement action against Japanese citizens is hardly likely to encourage trade between the two countries. We consider that it would be much better for all concerned if U.S. prosecutors respected the autonomy and sovereignty of the Japanese authorities by supporting them in the enforcement of Japanese antitrust laws rather than taking matters into their own hands. Japanese businessmen are likely to have more respect for domestic authorities applying local standards and doing so with a more nuanced appreciation of their business practices.

It might also be better for international relations if U.S. academics did not simply assume the guilt of foreign businessmen who are indicted by the U.S. authorities. We strongly take issue with Professor Connor's comment that, "*Because more than 90% of individuals indicted for criminal price fixing are found guilty, the practical consequence is that the great majority of Asian fugitives are likely guilty of the crimes charged, yet they suffer no penal consequences.*" Professor Connor would do well to remember that there is still a presumption of innocence in U.S. law. Moreover, as he himself has noted previously, "*prosecutorial losses at trial are frequent*"⁶ where defendants opt for jury trial. It may be that the 90% "success" rate on indictments is not so much indicative of guilt as of the risk aversion of defendants when a plea bargain is available.

Further, whilst it may be true that there are a relatively large number of foreign "fugitives" from U.S. justice, as Professor Connor notes in his article, it is also important to remember that many, perhaps all, of the individuals concerned will have left the United States well before they were indicted. We are not talking so much about fleeing from justice as simply not voluntarily returning to endure the cost and risk of fighting a prosecution in the U.S. courts.

⁶ John M. Connor & Robert H. Lande. Cartels as Rational Business Strategy: Crime Pays. *Cardozo Law Review* 34:427 at 443. [Available at <http://ssrn.com/abstract=1917657>].

Conclusions

It may or may not be the case that Professor Connor's statistics reveal some hidden truth about how foreigners are treated in U.S. antitrust sentencing, but they certainly do not provide a response to the points we made in our article. We were not looking to establish sentencing discrimination but to question the policy of aggressively pursuing foreign cartel managers. We still believe that this is a debate that should be had.