

COMMENT ON CARTEL ENFORCEMENT IN THE TRUMP ADMINISTRATION



BY JOHN M. CONNOR¹



¹ Professor Emeritus, Purdue University and Senior Advisor, American Antitrust Institute.

CPI ANTITRUST CHRONICLE

JUNE 2019

The Ambivalent Effect of Antitrust Damages on Deterrence

By Miriam C. Buiten



The Difference-in-Differences Approach in the Estimation of Cartel Damage

By Frank P. Maier-Rigaud & Slobodan Sudaric



Private Antitrust Enforcement in Italy

By Mario Siragusa & Alessandro Comino



Comment on Cartel Enforcement in the Trump Administration

By John M. Connor



Antitrust Damages, Fines, and Deterrence: Collusion in the Nurse Labor Market

By Roger D. Blair & Anita Walsh



It Ain't Over 'Til It's Over: Can Making Acpera Restitution Conditional Help Fill a Gap in the Law?

By Meegan Hollywood & Dave Rochelson



Penn State Hershey: A Cautionary Tale for Antitrust Litigators

By Margaux Poueymirou



Visit www.competitionpolicyinternational.com for access to these articles and more!

CPI Antitrust Chronicle June 2019

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2019[©] Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

I. INTRODUCTION

This comment examines certain trends in anti-cartel enforcement by the Antitrust Division of the U.S. Department of Justice (the Division), and coordinated actions by other U.S. Government agencies, with particular attention paid to developments in 2017 and 2018. By long-standing DOJ policy, criminal enforcement refers exclusively to the investigation of hardcore (*per se* illegal) cartel conduct and the imposition of penalties under Section 1 of the Sherman Act. Among the performance indicators examined are three measures of cartel-enforcement success that were highlighted by Assistant Attorney General for Antitrust Makan Delrahim's written testimony before the antitrust subcommittee of Congress in October 2018.² Delrahim's testimony is important because it is the first formal explanation to Congress of the first year or two of President Trump's antitrust enforcement goals and accomplishments.³ Applying traditional metrics, cartel enforcement has markedly slowed in 2017-2018.

This note also comments on the Antitrust Division's cartel enforcement goals and its expected future actions.⁴ As this paper can only analyze publicly available information, it is possible that the Division may have a number of significant big cases in the pipeline that could modify the recent downturn, or it could be redeploying its resources into novel collusion cases. I also discuss these possibilities.

Finally, a smattering of recent reports and news articles purport to find a decline in cartel enforcement activity among a broad swath of antitrust authorities.⁵ Therefore, I examine whether the recent decline in the Division's enforcement outcomes is *sui generis*, or part of a global phenomenon.

2 Delrahim's written testimony is dated October 3, 2018 – one year after his being confirmed for office and one year after his first full federal fiscal year in office. This Comment focuses on the top two bullet points of "Criminal Highlights," which in my opinion are the three most important quantitative indicators of the Antitrust Division's enforcement achievements. (See page 3 of *Statement of Makan Delrahim before the Subcommittee on Antitrust, Competition Policy, and Consumer Rights, Committee on the Judiciary, United States Senate* https://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/2018/12/13/delrahim_statement_10-03-18_on_atr_laws.pdf.)

3 The conventional purpose of such testimonies is to put the Division in the best possible light with respect to meeting its mission by citing supportive enforcement facts. Although such testimonies are expected to be somewhat selective in their supporting facts, they should not be deceptively unbalanced in the facts assembled for Congress.

4 The Congressional testimony was reinforced by a subsequent speech (see Makan Delrahim, *Remarks at the American Bar Association Antitrust Section Fall Forum*, Washington, DC (Nov. 15, 2018)). <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-remarks-american-bar-association-antitrust>.

5 See Morgan, Lewis & Bockius LLP, *Global Cartel Enforcement Report Year-end 2018* (2019), https://www.morganlewis.com/documents/m/documents/cartel/cartel-report_end-2018_190022.pdf ("Morgan Lewis 2019") and Simpson Thacher & Bartlett LLP, *2018 Global Cartel Enforcement Report* (2019), https://www.stblaw.com/docs/default-source/Publications/globalcartelenforcementreport_january2019.pdf ("Simpson Thatcher 2019"). In early 2019, these studies were cited in the *Financial Times* and the *Competition Policy International Newsletter*.

II. TIMING

President Trump assumed office on January 21, 2017 and very soon thereafter took control of the Justice Department. Jeff Sessions, long a member of the Senate Committee on the Judiciary, became Attorney General on Feb. 9, 2017. Delrahim was nominated in March 2017 and was confirmed by the Senate on September 27, 2017.⁶ Both Sessions and Delrahim wrote publicly of their support for Trump's candidacy in early 2016. The Trump administration revealed its proposed FY2018 federal budget in late February 2017 and submitted it virtually unchanged to Congress in March 2017. The DOJ and the Division's proposed budget was unchanged from the past two budget years.⁷

Convictions of detected cartel members involve three main steps. First, nearly all begin with negotiating guilty-plea agreements signed by DOJ prosecutors and attorneys for the cartel member(s) admitting guilt. The agreements are submitted to a district court judge for formal approval. Thus, the first publicly known conviction milestone is the date of a press release by the DOJ or by the defendant.⁸ The second step is a sentencing hearing by a district court judge, during which prosecutors argue in favor of the terms of conviction, primarily the extent to which the sentencing terms comply with the U.S. Sentencing Guidelines and why the defendant deserves a fine discount for cooperation with the Government; an officer of the corporation testifies as to his understanding of the legal implications of the agreement, such as the loss of rights to a jury trial and to appeal. These public (but not usually reported by the press) hearings are often held on the same day as the press release, but are sometimes delayed for a few weeks. The third date (or dates) of consequence are those on which cartel fines are paid to the Treasury or an individual is incarcerated. Increasingly, corporate fines are paid in multi-year installments with post-conviction interest added.⁹ Collection dates and amounts are typically known only to the DOJ, the overseeing judge, and the convicted firm.

In view of these dates, it seems fair to assign at least partial responsibility to the Trump administration for cartel enforcement decisions (opening cases, obtaining plea agreements, and imposing penalties on cartelists), beginning approximately from February 2017. Full control over the Trump administration's antitrust enforcement begins no later than October 2017, when Delrahim was appointed. Thus, nearly all enforcement activity for calendar years 2017 and 2018 may reasonably be assigned to President Trump and his appointees. However, some government statistics, including the Division's *Workload Statistics*, are reported using Federal Fiscal Years; FY2017 began on October 1, 2016, which means that 8 of its 12 months fall into the Trump presidency (the period of partial control); statistics from FY2018 will correspond to the Trump period with full control over antitrust policy.¹⁰

This Comment will develop statistics of trends in antitrust enforcement to compare *calendar* years 2017 and 2018 with earlier years. The cartel-related indicators I primarily focus on are the three highlighted by DAGA Delrahim: (1) corporate criminal fines; (2) criminal cases initiated; and (3) individuals convicted.¹¹ I also illustrate some large and important cases, as these tend to drive the totals presented.

6 Delrahim was immediately preceded by Acting Assistant Attorney General for Antitrust Brent Snyder, who had served as Deputy AAGA since November 2013 (<https://www.justice.gov/atr/public-documents/division-update-spring-2014/new-leadership-new-office-antitrust-division-criminal-program>). Snyder reported directly to Sessions until Sept. 27, 2017. For several months (as early as March to September 2017), Delrahim served as Deputy Assistant to the President and Deputy White House Counsel. Typically during such interregnums, Snyder would have deferred making significant policy changes and would have informed (and perhaps sought approval of) AG Sessions about decisions regarding major antitrust cases.

7 Trump's 2018 budget was enacted late (in March 2018), so the Division operated under continuing resolutions through March 2018.

8 Unknown to the public are the identities of companies that applied or were accepted to the Corporate Leniency Program. Successful applicants are immunized from federal prosecution and must fully cooperate with the Division by providing evidence and testimony about the particulars of a cartel. While such evidence may be sufficient to convict the remaining members of the cartel, the Division gives very large fine discounts for the second member of the cartel to cooperate.

9 Installments are usually over five or six years, but one case involves more than 20 years' of annual payments. In unusual cases, a company may have to accept a court-appointed monitor to supervise injunctive or structural relief.

10 The DOJ's *Workload Statistics* are released more than a year after the FY ends, so FY2018 is not available for this comment. (See <https://www.justice.gov/atr/file/788426/download>)

11 This comment also focuses on data generated by international cartels because they tend to account for almost all of the penalties imposed for price fixing.

A. Corporate Criminal Fines According to DOJ Sources

Delrahim states that the Division imposed over \$3.243 billion in criminal cartel fines in FY2016 and FY2017, nearly all of which are *corporate*, not individual, fines.¹² These fines are close to the criminal fines reported in the FY2017 *Workload Statistics*.¹³ The fines for FY2017 alone (\$2.785 billion) are the highest U.S. criminal cartel fines ever recorded for a single FY.¹⁴

Clearly, the Trump administration cannot be credited with fines reported for FY2016 because these were approved wholly by officials appointed by the Obama administration. Furthermore, I believe that the fines reported for FY2017 should also be credited almost entirely to decisions made during the Obama administration.

The reason is rooted in the distinction between the date on which a fine is *announced* or “*agreed to*” and the time when it’s ordered by a court (i.e. *obtained*).¹⁵ Announced dates are those on which a press conference is held or a press release issued with details on a company’s guilty plea (or, rarely, a trial outcome). When a guilty plea is announced, the Government’s prosecutorial effort with respect to the named defendant is for all practical purposes completed, and its government penalty is fixed.¹⁶ Plea dates are the ones reported by the press and are the most straightforward to link to fines. However, with one exception, the DOJ does not add up fines according to the year they were “*agreed to*.”

In contrast, *imposition* dates are those on which a judge holds a hearing that orders or approves the payment of a fine, mandatory restitution, or other penalty. At such hearings, a corporate officer or the individual defendant is present and affirms the terms of the sentence. Sometimes a sentencing hearing is held on the same day as a plea agreement, but often the sentencing is delayed. Penalties proposed by prosecutors are practically never challenged by judges.¹⁷

Collection dates are different still. Most fines are paid in full within a few weeks of sentencing. Alternatively, if the penalty is paid to the Treasury in multi-year installment payments with added interest, these collection dates may be spread over six or seven years after the plea. Installment payments became very common in the 2000s. Collection dates are not usually available in posted documents on the DOJ Web site, so delays in recording fines after announced dates are hidden from easy access. That is, it is difficult to reconcile guilty-plea-agreement dates with the DOJ’s “collection” dates typically reported in the Division’s *Workload Statistics*.¹⁸

Although the U.S. DOJ *Workload Statistics* reports on fines collected, few, if any, of the world’s 140 other antitrust authorities use “collection” dates to compile their enforcement statistics. Nearly all other antitrust authorities in the world assign as a fining date the day a decision is announced, which is most comparable to a plea-agreement date. This distinction is of pivotal importance in evaluating the enforcement record of the Trump administration. If one evaluates penalties using the date of imposition, almost all U.S. cartel fines since January 2017 are attributable to enforcement actions taken during the Obama administration.

12 Individual fines amounted to \$5.25 million and \$1.02 million in FY2016 and FY2107, respectively. These individual fines are negligible (0.2 percent) compared to the corporate fines reported.

13 These data were provided to me by the DOJ upon request. As of late Dec. 7, 2018, these data were not yet posted on the DOD Website – 14 months after FY2017 ended. The total shown is \$3.238 billion.

14 The previous high of \$1.905 billion was in FY2014.

15 Italicized words are the unique jargon developed by the DOJ for dating penalties.

16 When the DOJ makes its recommendation to a court for penalties, courts nearly always approve in a brief *pro forma* sentencing hearing, at which defendants renounce their rights to appeal their sentences. Other than collecting the monetary penalties (i.e. fines and mandatory restitution) and forwarding them to the Treasury, little remains to be done by the DOJ after a plea agreement. Payments for antitrust fines are due in full (or as a first installment) in as little as ten days; late payments of U.S. fines are unheard of. Moreover, although DOJ prosecutors sign multiple guilty plea agreements sequentially, the first corporate cartelist to confess is the first public key event that cracks a cartel, after which the rest of the cartelists usually soon fold with less work per case by prosecutors.

17 I know of only two times since 1990 when a judge revised a penalty (upwards) from a plea agreement.

18 Confusingly, the DOJ jargon for reported collection dates are the fiscal years fines are “*imposed*.” This linguistic practice supports the fiction that it is courts that actively set cartel fines rather than prosecutors. (See footnote 18 in the current DOJ *Antitrust Workload Statistics*). Usually, fairness hearings are held soon after plea agreements are signed, so the two dates are very close. However, as Table 1 shows, at least \$2.52 billion in cartel fines were announced in May 2015 but were not recorded as “imposed” until FY 2017; knowledge of this delay was delayed until November 2019. Similar retardation in reporting is caused by installment plans.

This statement can be proven by identifying most of the companies that were fined as part of the \$2.785 billion in FY2018. Identification of the particular companies is possible because the DOJ reveals the names, cartel product, fiscal year, and other key facts about companies in the “\$10-million-fine Club” (that is, all companies fined \$10 million or more for price fixing).¹⁹

Defendant	Cartel	DOJ FY	Date DOJ probe made public	Date of Guilty Plea	DOJ Fine (\$ mil.)
Citicorp	FOREX	2017	11/12/14	5/20/15	925.0
Barclays	FOREX	2017	11/12/14	5/20/15	650.0
JPMorgan	FOREX	2017	11/4/14	5/20/15	550.0
RBS	FOREX	2017	11/12/14	5/20/15	395.0
Hitachi	Auto Parts	2017	8/9/16	8/9/16	55.4
Bumble Bee	Tuna	2017	3/14/15	8/2/17	25.0
Rubycon	Capacitors	2017	5/26/15	8/22/16	12.0

Source: ANTITRUST DIVISION: *Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More* (Oct. 25, 2018), DOJ press releases, and tradet press reports.

Table 1 lays out the identity of most of the companies²⁰ and fines that appear in the DOJ's *Workload Statistics* for FY2017; their fines add up to \$2.612 billion out of the reported FY2017 total cartel fines of \$2.785 billion – 94 percent. The bottom-row cases (Hitachi, Bumble Bee, and Rubycon) show a normal pattern of prosecutorial dates: guilty pleas are announced in FY2017 itself or very late in FY2016, and sentencing hearings are presumably scheduled within a few weeks of a guilty-plea agreement date (i.e. after October 1, 2017). Thus, recording these fines *announced* in FY2016 as *imposed* in FY2017 is perfectly reasonable.

However, the four huge fines on banks imposed for *FOREX Currency Exchange* collusion display strange, unorthodox dating for DOJ statistical reporting. Financial newspapers reported the existence of criminal investigations in November 2014 (two years before the 2016 U.S. Presidential election) and all four banks pled guilty seven months later (May 2015). Indeed, class actions were filed in *November 2013*, most likely shortly after a grand jury was empaneled. Although these were complex cases involving coordination with other agencies of the federal government, this phase was largely completed by late 2013 when the CFTC fines were announced. Why the date of the fines imposed was delayed from May 2015 to the year after October 1, 2017 is unknown, but the lion's share of prosecuting against these four banks was certainly accomplished during the Obama administration. It is doubtful that the Delrahim-Trump team deserves any enforcement credit.

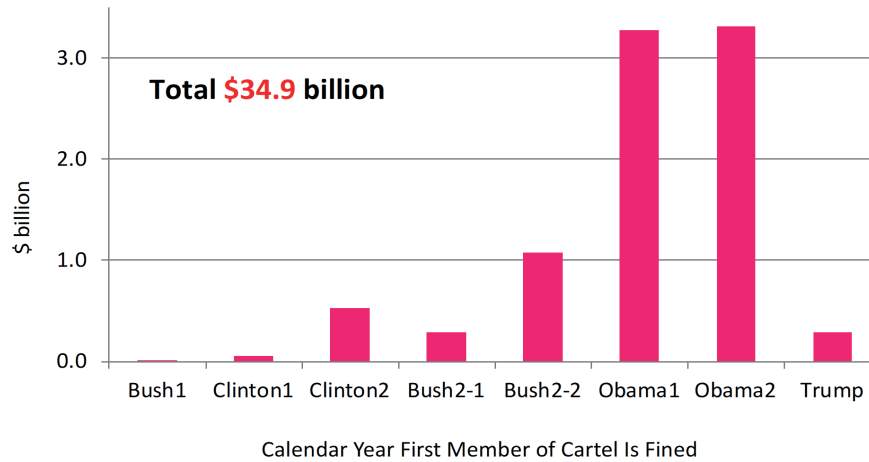
19 See *Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More* <https://www.justice.gov/atr/page/file/991706/download>, which is current as of Oct. 25, 2018. The source excludes three significant FY2019 fines totaling \$82 million and restitutions of \$154 million by three petroleum and petroleum-wholesaling companies based in South Korea.

20 The *Workload Statistics* states that a total of 11 companies were fined, so four unnamed companies assigned to FY 2017 and accounting for \$173 million in fines cannot be positively identified.

III. CORPORATE CARTEL FINES BY YEAR IMPOSED

U.S. Government fines²¹ announced *per annum* arrayed by Presidential term are shown below, including the first two years of the Delrahim-Trump regime. This figure demonstrates that when the timing issue of fines is assigned according to announcement dates, the Trump administration's record is very weak compared to all recent presidents, except for President George H.W. Bush ("Bush 1" in the figure below). Indeed, the Obama record is *eleven times* higher on an annual basis than the first two years of the Trump administration.

Announced Cartel Fines, 1990-Nov. 2018, U.S. GOVT., Annual Average, by President



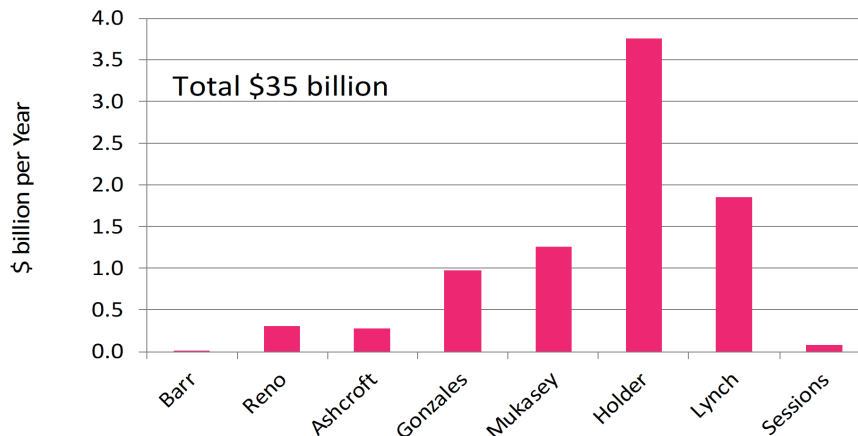
July 2018

J M Connor, Purdue U.

126

The following slide arranges the same U.S. Government cartel fines according to the tenure of the Attorney General. Trump's Attorney General Sessions' record shows a similarly low level of cartel fines compared to the previous six AGs.²²

Cartel Fines per Year, 1990-2017, by U.S. Attorneys General



Nov 2018

J M Connor, Purdue U.

127

²¹ Civil fines imposed by the CFTC and other federal agencies in concert with the DOJ (that is, as members of federal "Task Forces") are included in the slide with DOJ-recommended fines.

²² However, fines approved by AG Sessions do exceed those of AG Barr in the early 1990s. Note that Barr was appointed to succeed Sessions as AG in mid-February 2019. Accounting for inflation does little to modify the relative size of the fines.

IV. CASES INITIATED

Case counts are somewhat weak indexes of future enforcement efforts and prosecutorial success.²³ However, Section 1 corporate criminal cases opened (indictments) in one fiscal year almost inevitably result in a conviction in the same year or the next one.²⁴ Thus, case-opening counts revealed in the DOJ's *Workload Statistics* are precursors of the number of criminal indictments and convictions likely to be registered in the near future.²⁵

Section 1 cases opened in the Trump administration (FY2017 and FY2018) averaged 26 per year.²⁶ The 26-case count is 37 percent lower than the annual average of 41.4 during Obama's eight years, and is 65 percent lower than the previous 27 years (i.e. the FY1990-FY2016 annual average). Such low numbers of investigations opened presages very low numbers of convictions in the remainder of Trump's term in FY2019-FY2020.

To be fair, a small number of cases can still lead to heavy sanctions on large numbers of cartelists in a year or two. For example, the Division is known to be investigating suspected cartel activity in the *Generics Pharmaceuticals* industry. This case now involves alleged price-fixing on 300 products by more than a dozen manufacturers.²⁷ The large sales' size of the industry and exceptionally high overcharges suggests that likely fines will be very high.

V. INDIVIDUALS CONVICTED

The final claim to superior enforcement made by Delrahim is that 30 individuals were sentenced in FY2017 to incarceration for price fixing, the highest number since FY2012. There is no reason to doubt this number, but it is worth noting that most of the persons involved appear to be connected with conduct in one case covering four states, *Public Real Estate Foreclosure Auctions*. As of early 2016, this case has resulted in more than 100 individual guilty pleas going back to at least 2010.²⁸ Affected commerce in the Auctions cases is quite low relative to *LIBOR*, *FOREX*, and similar financial manipulation cases. However, these individuals were sentenced to rather short prison terms by historical standards; the mean average is 8.6 months, whereas in the G. W. Bush and Obama administrations the average prison sentence was 20.4 and 21.1 months, respectively.

VI. THE FUTURE OF U.S. CARTEL ENFORCEMENT

A full and fair assessment of the initial Trump years should also consider the *quality*, potential severity, or innovativeness of Sherman Act initiatives. Here there are three developments of interest. First, the Division has announced that it will be suing under Section 4A of the Clayton Act, which since 1990 has permitted the federal government to obtain treble damages from overcharges it paid. This enforcement power has been used sparingly in the past 30 years.²⁹ However, in November 2018, the Division obtained criminal guilty plea agreements from three petroleum companies that had rigged bids on fuels supplied to the U.S. military stationed in South Korea.³⁰ The three will pay \$236 million in monetary

²³ See note 25 *infra*.

²⁴ Cases opened against individuals on average involve longer lags to completion, and a significant share of individual indictments involving cooperating witnesses are dismissed. Corporate Leniency Program applicants that are rewarded with amnesty are not indicted.

²⁵ Over fiscal years 1990 to 2017, the number of Section 1 cases opened is significantly positively correlated with the number of grand juries opened one year later ($r=+0.29$), with a two-year lag ($r=+0.29$), or a three-year lag ($r=+0.23$). Similarly, the number of criminal cases opened is positively correlated ($r=+0.27$ and $r=+0.30$) with the number of companies criminally charged one and two years later. Although positive, these correlations are not high (i.e. close to one).

²⁶ The FY2017 figure is 38 cases (from *FY2017 Workload Statistics*) and the 14-case figure for FY2018 was compiled by Robert Connolly (*Cartel Capers* blog, Nov. 2018).

²⁷ See Christopher Rowland, Investigation of Generic "Cartel" Expands to 300 Drugs, *The Washington Post* (Dec. 9, 2018). (https://www.washingtonpost.com/business/economy/investigation-of-generic-cartel-expands-to-300-drugs/2018/12/09/fb900e80-f708-11e8-863c-9e2f864d47e7_story.html?noredirect=on&utm_term=.fc13aa0bf2db).

²⁸ See *Division Update Spring 2016* (<https://www.justice.gov/atr/division-operations/division-update-2016/real-estate-foreclosure-auctions>). Many earlier fines and prison sentences were very large (up to 10 years, \$1 million).

²⁹ Albert A. Foer (ed.), *The Next Antitrust Agenda*. Vandeplass (2008): 23. See also Delrahim *supra* note 2, stating that only three very minor restitutions were obtained in those years.

³⁰ See Complaint, *United States v. GS Caltex Corp. et al.*, Case No. 2:18-cv-1456, U.S. District Court for the Southern District of Ohio. (Nov. 14, 2018).

penalties, including restitution under Section 4A that is greater than single damages. Delrahim promises to “revitalize” Section 4A enforcement in the near future.³¹

Second, the DOJ has very recently filed an amended complaint that asserts that “...agreements to unlawfully exchange competitively sensitive information...” is a violation of Section 1 of the Sherman Act.³² Although this complaint is entered as a civil matter, the outcome of this case may have far-reaching implications for anti-cartel enforcement when viewed in an international context. For years, the European Union and scores of antitrust authorities using the EC template for antitrust enforcement have taken a far harder line on the exchange of commercially sensitive information, such as future price and product announcements and planned strategic competitive moves. The EC has been treating sharing these with rivals as practically *per se* violations of competition law, whereas Common Law countries like the United States have by-and-large not considered them a basis for prosecution (except as ancillary factors in the few civil collusion cases filed). If this innovation presages a more uniform alignment of multilateral cartel-prosecution standards, it would add to the already impressive voluntary harmonization of these policies among global antitrust authorities.

Third, Delrahim has announced his intention to continue to prioritize enforcement of buyer-power collusion in labor markets, so-called no-poach agreements, a policy announced in October 2016.³³ The no-poach enforcement policy clarifies how sharing compensation data may constitute an illegal exchange of competitively sensitive information. In April 2018, the Division announced its first indictment involving employee non-competition agreements, a civil suit against a French and a U.S. manufacturer of railway equipment.³⁴ The two defendants agreed to conduct restrictions and to cooperate with the DOJ to prosecute a third alleged violator. This trail has been blazed by at least two private antitrust suits for skilled “high tech” R&D employees in California markets for cutting-edge electronics products, and for special skills in animation studios.³⁵ These two suits were successful in settling for several hundred million dollars each even though they were not, as far as is known, preceded by a criminal investigation by the DOJ.

VII. IS THE SLOWDOWN NATIONAL OR GLOBAL?

The most current information on enforcement from the Division itself is available in four *Criminal Enforcement Trends Charts*, which encapsulate ten fiscal years of data through the end of FY2018 (i.e. September 30, 2017).³⁶ Much attention has focused on the Division’s 2017-2018 data showing historic declines in new criminal cases opened (the lowest number since 1972), corporations charged, and collected criminal fines.³⁷

Compilations of fines made by global law firms also show declines, but the methods used and rates found are not consistent,³⁸ and time periods are very short.³⁹ A time-tested source of consistent, long-term data on the world’s largest cartels can be found in the Private International Cartels (“PIC”) data set.⁴⁰

³¹ Delrahim also threatens to seek full treble damages if defendants refuse to cooperate by litigating claims.

³² Amended Complaint, *United States v. Sinclair Broadcast Group, Inc. et al Case No. 1:18-cv-2609-TSC*, U.S. District Court for the District of Columbia (Dec. 13, 2018).

³³ U.S. Department of Justice. *Press Release: Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation*. (October 20, 2016), <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals>. Technically, the policy statement is a joint DOJ-FTC Guidance. The Guidance says that *naked* no-poach agreements will be investigated as criminal felonies, whereas other types will be brought as civil indictments.

³⁴ U.S. Department of Justice. *Press Release: Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees*. (April 3, 2018), <https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete>. The final judgment was filed in July 2018; no criminal or monetary penalties are imposed. Delrahim is quoted as endorsing the DOJ’s 2016 policy, but is silent on whether he will favor criminal or civil indictments.

³⁵ See *In re: High-Tech Employee Antitrust Litigation* (U.S. District Court, Northern District of California 11-cv-2509) and *In re: Animation Workers Antitrust Litigation* (12/14).

³⁶ Antitrust Division, *Criminal Enforcement Trends Charts* (Updated January 28, 2019), <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>.

³⁷ A deep reduction in prison sentences in 2017-2018 is obscured by long averaging in one chart.

³⁸ E.g. Simpson Thatcher cites U.S. cartel fines in 2018 of \$96 million, Morgan Lewis \$406 million.

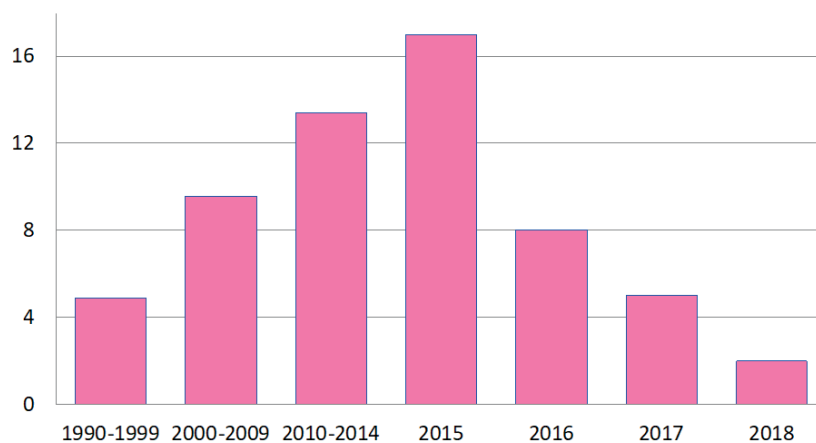
³⁹ The Simpson Thatcher (2019) analysis reports a 54 percent decline in global cartel fines and 17 percent decline in U.S. cartel fines from 2016 to 2018. This report is unclear, but apparently reports fines both “agreed to” and “imposed.” A less complete analysis by Morgan Lewis (2019) computes a 75 percent decline in U.S. cartel penalties and a 72 percent decline in ten major jurisdictions from 2016 to 2018.

⁴⁰ Beginning in 2019, this data set will be freely available and updated regularly by the Competition Committee of the Organisation of Economic Co-Operation and Development in Paris.

A. Detections Are Down

The following slide illustrates the temporal pattern of detections on international cartels by the Division (221) or other federal agencies (23) since 1989. After peaking in 2015, the number of new cartels publicly known to be under investigation in 2017 and 2018 fell below the average of the 1990s. World detections also peaked in 2015 and declined each year thereafter, but not as rapidly as in the U.S.

Dramatic Decline in Annual Rate of Cartel Detections, U.S. Govt., 2015-18



Feb 2019

J M Connor, Purdue U.

38

Detection counts can be understated. Data on detections in the most recent years are understated because in criminal systems grand juries and some criminal indictments are kept under seal; in other jurisdictions raids are also sometimes unreported by the press and their dates not revealed until several years later. Government investigations on average take two or three years to be completed. Detection rates based on reliable counts (up through 2015) are rising rapidly.

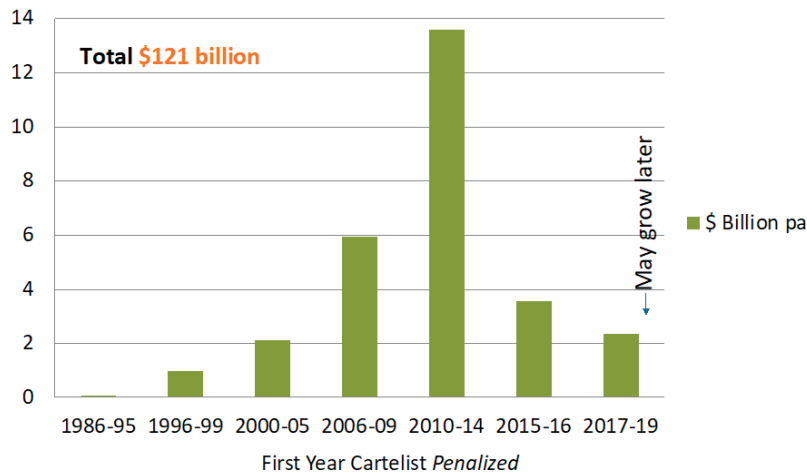
B. Cartel Penalties Trends

The PIC data set records fines on the day they are agreed to or the day the authority announces its decision.⁴¹ Imposition and collection dates are ignored, as are subsequent changes in penalties by appeals courts. The following figure shows \$121 billion in *announced* fines world-wide: they peaked in 2010-2014 and fell precipitously thereafter. The global trend is very similar in the United States, the Rest of the World (ROW), and the EU, except that the latter fell less sharply.⁴² The figure omits damages settlements, which peaked in 2005-2007 (settlements in damages cases are usually announced more slowly than fines, typically sequentially years after fines are determined, and the last settlement agreements are announced several years after the first).

⁴¹ To make these penalties comparable across jurisdictions, U.S., Brazilian, and a few other jurisdictions' monetary penalties are dated in the year the *first cartelists'* penalty is announced; subsequent fines tend to flow out quickly thereafter. However, the timing of these penalties may appear slightly front-loaded compared to other data sets.

⁴² The drop in the EC's annual fines in 2017-2018 was 68 percent and 71 percent compared to 2015-2016 and 2010-2014, respectively, whereas the EU's NCAs experienced a far slower decline (11 percent and 54 percent).

Annual Fines Grew through 2014, Dropped In 2015-2019



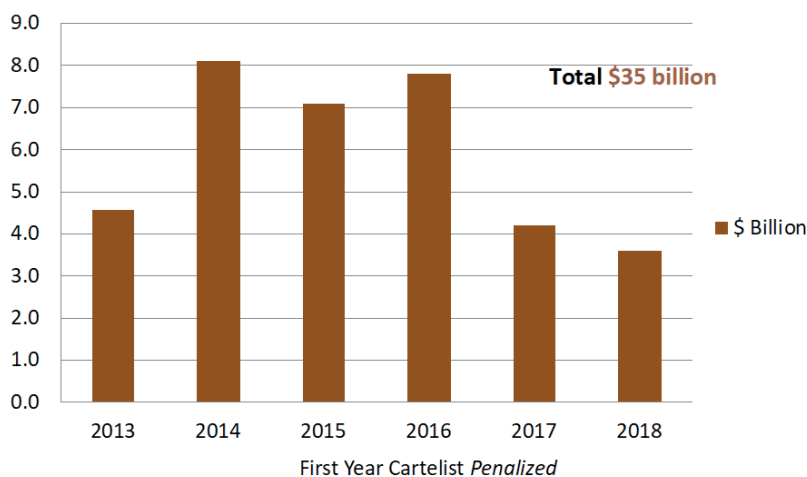
Feb. 2019

J M Connor, Purdue U.

86

The PIC data may be sensitive to the methods of data collection employed or the announcement dates used by the author. While there are no comparable data sets on cartel fines that are as comprehensive in geography or time, several large international law firms try to compile similar data. The most comparable in terms of geographic breadth are the annual *Global Cartel Enforcement Reports* of the Morgan Lewis law firm for the years 2013-2018.⁴³ The Morgan Lewis data shown below demonstrate that 2017-2018 fines are indeed lower than the 2013-2016 years, but the decline is not as sharp as other data sources suggest.

Global Fines, Announcement Year of Cartel Fines: Law Firm Data



Feb. 2019

J M Connor, Purdue U.

86

Thus, by-and-large, trends in U.S. fines have mirrored trends in most other jurisdictions. There may be some common underlying factors that may explain these widespread declines after 2015 or so. One possibility is that after 15 to 25 years' experience, companies no longer find applying

⁴³ My examination of these reports for the six overlapping years 2013-2018 indicates that the Morgan Lewis reports covered 91 percent of the fines found in PIC. (Available at https://www.morganlewis.com/documents/m/documents/cartel/cartel-report_end-2018_190022.pdf).

for antitrust amnesty as appealing as they did a decade before.⁴⁴ Some observers infer that cartel cases and fines increased primarily because of increases in usable amnesty applications and, contrariwise, because cases and fines have declined so have previous applications.⁴⁵ One problem with this hypothesis is that U.S. amnesty applications and awards are unobservable.⁴⁶ Thus, there is no way to confidently link U.S. applications to subsequent enforcement performance. Also, there have been recent appraisals of the U.S. Leniency Program that conclude that it is superior in most ways to an EC-style program.⁴⁷ Moreover, a recent thorough survey of economic studies of leniency programs concluded that evidence for positive effects on deterrence, while somewhat mixed, is strongest in the United States.⁴⁸

VIII. BACKLOG

There is a distinct possibility that the low U.S. enforcement indicators in 2017-2018 could signal a pause in enforcement activity rather than a break with the cartel-policy regime. Some reports are upbeat about big cartel cases in the offing.

“There is also a strong pipeline of new investigations and enforcement actions across all industry sectors and geographies. It is likely that 2019 will see some of these develop into multi-jurisdictional cases....” (Simpson Thatcher 2019: 4).

As of February 2019, the only large international cartel investigations known to be on the cusp of active convictions are *Generic Pharmaceuticals*, *Sovereign Bonds*, and *Diesel Motor Emissions*.⁴⁹ This is not a long list, and the possibility of such prosecutions has to be counterbalanced against substantial concerns about dwindling professional resources in the Division. An investigation by a leading business newspaper found that staff numbers available in Washington for cartel investigations were down 27 percent in the first two years of the Trump administration.⁵⁰

IX. SUMMARY

Assessing a President’s four-year accomplishments with only two years’ information is a perilous exercise.⁵¹ Yet, whether the Trump administration can develop a strong anti-cartel enforcement record by the end of 2020 is dubious. Supporting data presented about its progress in 2017-2018 at this point seem to rest primarily upon initiatives launched in the late Obama administration. Furthermore, based on the number of cases initiated in 2017-18, the *quantity* of cartels, cartelists, and penalties imposed is likely to be low by the standards of the H.W. Bush and Obama administrations.

Moreover, by scanning what has become public about cartel investigations initiated in 2017-2018, the backlog of potentially large cartel cases appears to be slim. Perhaps the Obama administration was simply lucky to have several huge cartels crack open under its watch -- vast international cartels like *Auto Parts*, *LIBOR*, *FOREX*, and other collusive banking schemes. While most cartel investigations are kept confidential by prosecutors until a guilty plea is announced, grand jury witnesses can and do reveal the existence and targeted markets of criminal investigations, and this information is often publicized.

44 See Robert B. Bell & Kristin Millay, *The Corporate Leniency Program: Did the Antitrust Division Kill the Goose that Laid the Golden Eggs?*, ANTITRUST 33 (2018): 80-87. The authors’ straightforward thesis is that the effective Leniency and amnesty programs were “incredible” successes (i.e. increased the number of applications and the share of cartels prosecuted after leniency was available) and caused a subsequent increase in detections and in fines.

45 Bell and Millay (*infra* fn. 42) at p. 82 assert that “...[leniency programs] seem to be the most significant factor....” explaining reduced U.S. cartel enforcement in 2017-2018. These authors rely heavily of threats of increased severity from DOJ speeches around 2014, plus one anecdote, to make their case. I am unpersuaded.

46 Annual numbers of leniency applications are not available from DOJ statistics. Bell & Millay (*infra* fn. 42) rely upon facts cited in official speeches, which stopped giving aggregate data for the years after 2010.

47 Evgenia Motchenkova & Giancarlo Spagnolo, Leniency Programs in Antitrust: Practice v. Theory, *Competition Policy International Antitrust Chronicle* (January 2019): Table 2.

48 Catarina Marvao & Giancarlo Spagnolo, Cartels and Leniency: What We Have Learnt, Chapter 4 in *Handbook of Game Theory and Industrial Organization: V. II*. Cheltenham, UK: Edward Elgar (Feb 2018).

49 The *Petroleum Products for the Military in Korea* cartel is supposed to be continuing, but there are unlikely to be any more significant penalties imposed. A fifth case in development is *Skilled-Labor Poaching by Railway Equipment Manufacturers*, also likely to generate modest fines.

50 US: Antitrust Regulator Faces Staffing Issues, *CPI Newsletter* (February 10, 2019).

51 The teacher in me wants to assign a grade of C-, but an “incomplete” grade may be fairer.

AAGA Delrahim's Congressional testimony and official speeches offer a few intimations that the administration is committed to an assertive enforcement stance. First, Delrahim cites several widely accepted indicia of active cartel-enforcement performance: many Section 1 cases initiated, high annual corporate fines, and lengthy prison sentences for cartel managers. Second, Delrahim has committed the Division to three initiatives that will broaden its anti-cartel mandate and will further harmonize policies and practices among the world's antitrust authorities. They are: (1) seeking greater restitution for federal government agencies harmed by bid rigging; (2) bringing more indictments against collusive conduct involving sharing commercially sensitive, strategic sales information; and (3) a commitment to investigate no-poach agreements. While offering some grounds for optimism, the true tests for the Division's commitment to strong anti-cartel enforcement are whether its long-standing campaign against international cartels persists, and whether some of its information-sharing cases allege criminal conduct.



CPI Subscriptions

CPI reaches more than 20,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.

