



DEPARTMENT OF JUSTICE

Prosecuting Antitrust Crimes

BILL BAER
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Remarks as Prepared for the
Georgetown University Law Center
Global Antitrust Enforcement Symposium

Washington, DC

September 10, 2014

Good morning. Thanks to Dean Treanor for the kind introduction and for inviting me here today. This annual conference hosted by Georgetown University Law Center plays a key role in our international dialogue on the role competition principles and antitrust enforcement play in ensuring that consumers benefit from competitive markets. It is an honor to be part of it.

Last year my remarks concerned the importance of effective remedies in our antitrust law enforcement efforts. This year my focus is on criminal enforcement—on our approach to companies and executives that conspire to fix prices, rig bids, or allocate markets. The Supreme Court puts it succinctly, calling cartels “the supreme evil of antitrust.”

There is no more important work we do. Those who conspire to subvert the free market system and injure U.S. consumers are prosecuted vigorously and penalized appropriately. Our record demonstrates that corporations that commit these crimes face serious consequences, including significant criminal fines and, in appropriate cases, tough probation terms. Individual wrongdoers risk lengthy sentences. Courts have imposed criminal fines on corporations totaling as much as \$1.4 billion in a single year; the average jail term for individuals now stands at 25 months, double what it was in 2004. Those penalties tell only part of the story. Perpetrators also must confront private and state civil suits seeking treble damages and risk other collateral consequences for their crimes.

Often our prosecutions end with plea agreements. So long as price fixers are held accountable for their crimes, this is an efficient and appropriate way to resolve criminal price-fixing allegations. When the defendant exercises its right to put us to our proof, however, we have the obligation to proceed to trial to ensure justice is done. Our recent record demonstrates the division’s willingness and ability to prosecute successfully antitrust criminal violations. We recently won guilty verdicts against two conspirators who rigged public mortgage foreclosure auctions following the collapse of the real estate market in northern California. In New Jersey, we convicted an EPA Superfund site project manager who rigged bids and accepted kickbacks. And just this summer, the Ninth Circuit affirmed the corporate convictions of AU Optronics and its American subsidiary, and the individual convictions of two of its executives for fixing prices in the LCD industry.

Our success at trial and in the appellate courts is a tribute to our talented and dedicated prosecutors and to our productive collaboration with the FBI and other federal, state and local investigative agencies. We also increasingly benefit from working closely with competition enforcers from many agencies around the world.

Our successful efforts to detect and prosecute cartels also reflect the broad consensus in the United States that schemes to deny consumers the benefits of competition have no place in the free market and merit significant punishment. This is not a partisan issue. This Administration and its predecessors have made cartel enforcement a top priority. Our efforts continue to enjoy strong congressional backing, as I heard repeatedly last year in oversight hearings in both the Senate and the House.

Despite our record of success and the support these efforts receive from the courts, from Congress, and from the American public, there remains a powerful temptation to cheat the system and profit from collusion. Our recent actions reflect the need for constant vigilance. In the last few years we prosecuted major national and international price-fixing and bid-rigging cartels involving auto parts, ocean shipping, air cargo, municipal bond investment contracts, and financial benchmarks like LIBOR. And there is more to come from investigations that are not yet public.

I mentioned the key roles played by the FBI and other enforcers in investigating these crimes. The division's corporate and individual leniency policies provide another important tool. Many would say, and I would agree, that the division's corporate leniency policy has been a real game changer since the current version was adopted in 1993. Under that policy, the division will not prosecute the first qualifying corporation to report a cartel, fully admit to its role in the conspiracy, identify its co-conspirators and the events of the conspiracy, and provide complete and timely cooperation. Similar programs have increasingly been embraced around the world, and now scores of enforcement agencies have adopted leniency policies.

While leniency applications are by no means the only way we uncover antitrust violations – indeed, more than a third of our current investigations began without a leniency applicant –

there is no question corporate leniency is a key part of our prosecutorial toolkit. In my time at the division – as well as in my years in private practice – I have observed the powerful incentives the leniency program creates for wrongdoers to come forward and mitigate the consequences associated with their criminal violations of the Sherman Act.

Companies that have engaged in antitrust crimes and decide to apply for antitrust leniency must recognize that the policy requires far more than a quick phone call to the division and a promise to cooperate. That seems obvious. But I am not sure that all leniency applicants and their counsel understand it. Our policy requires complete and continuing cooperation with the division throughout our investigation and resulting prosecutions. It involves a thorough and prompt investment of time and resources. Speed is crucial at the early stages of an investigation. In our experience a company that invests the time and the resources can typically satisfy the initial requirements for conditional leniency within a few months.

We expect leniency applicants to make those investments, including conducting a thorough internal investigation, providing detailed proffers of the reported conduct, producing foreign-located documents, preparing translations, and making witnesses available for interviews. Companies unwilling or unable to make the investments necessary to meet these obligations, or those that think they can do so on a timetable of their own choosing, will lose their opportunity to qualify for leniency.

When companies apply for leniency, their current employees may earn it too. As with employers, however, leniency for employees is not an entitlement; it requires full and timely cooperation. To cooperate fully, individuals must be prepared to admit to all collusive conduct they participated in or know about. They need to be prepared to be candid and credible witnesses in front of a grand jury and at trial.

We recently have seen instances where counsel for an individual wanted to pick and choose where and how a client would cooperate—to confess to crimes in one market in hopes of qualifying for leniency, but not cooperate in another market, for which the client is culpable but not eligible for leniency. It does not work this way. If an employee is not willing to provide

complete and candid testimony about the full scope of his or her wrongdoing, then that employee is not being fully cooperative. In that case, the employee does not meet the leniency policy's requirements and will be subject to prosecution. To the extent there has been any ambiguity on this point, I am clearing it up now.

In recent years we have on occasion investigated jointly with other DOJ components conduct reported by a leniency applicant that involves both antitrust violations and other crimes, such as fraud, tax evasion, or corruption. Our leniency policy is quite clear that it governs only the Antitrust Division's exercise of its prosecutorial discretion in connection with self-reported criminal violations and does not prevent other components from prosecuting offenses other than Sherman Act violations. Indeed, we have seen fact patterns where the antitrust crime is only part of the bad behavior engaged in by the leniency applicant.

While the department never has and never would use other criminal statutes to do an end-run around antitrust leniency, the point is that the leniency policy does not insulate corporations from all criminal exposure beyond the Sherman Act. Having said that, self-disclosure and cooperation are hallmarks of both the leniency policy and good corporate citizenship, and will be taken into account when the department considers criminal conduct outside the scope of the leniency application. The department assesses corporate charging decisions under the factors set forth in its Principles of Federal Prosecution of Business Organizations. Those factors place self-reporting, including of antitrust crimes, front-and-center in the charging calculus. So a leniency applicant, even if facing exposure for crimes outside the scope of the leniency policy, still benefits materially from reporting and cooperating with respect to both its antitrust and non-antitrust crimes.

The Division and the public benefit too. Experience teaches that our investigations often proceed more quickly with a cooperating leniency applicant. Early cooperation allows us to develop the facts quickly, in some cases by using covert techniques to expose more information about the nature and extent of the conspiracy.

In addition, the prospect that there may be a cooperating corporation in an antitrust investigation has changed the calculus for the other corporate co-conspirators. When an investigation becomes public, for example when we serve grand jury subpoenas or execute search warrants, price fixers face a real life prisoners' dilemma. They and their lawyers must consider whether there is a cooperating company—a leniency applicant. The rational fear that someone already is cooperating provides a strong motivation to conduct prompt internal investigations and early assessments of criminal exposure. If there is a problem, companies need to assume that the division probably already knows about it. As a result, we are seeing more companies approach the division at early stages of our cartel investigations, seeking to mitigate the consequences of their criminal wrongdoing.

We encourage that. It is the right thing to do. Even if a company is too late to qualify for leniency, we take early acceptance of responsibility and meaningful cooperation into account in determining the appropriate consequences for offending corporations and their executives.

It is important to keep separate these two concepts – acceptance of responsibility and cooperation that substantially assists the division. A company accepts responsibility when it truthfully acknowledges it has violated the law and agrees to plead guilty. Under the Sentencing Guidelines, companies that choose to accept responsibility will receive a lower culpability score, and therefore a lower fine range. Companies that delay owning up to their role in the antitrust conspiracy do not receive that consideration and the division will seek fines from progressively higher points in the fine range.

Cooperation requires more than accepting responsibility, though. Companies that approach us early and advance our investigations in meaningful ways will see that cooperation credited in our approach to their sentences. But, as with corporate leniency, promises to cooperate are not enough. Significant reductions in criminal sentences for substantial assistance will be reserved for those companies that actually help us investigate and prosecute antitrust crimes, as described in Chapter 8 of the Sentencing Guidelines.

A related point is that our sentencing recommendations will be based on the value of the cooperation we receive, not simply on the order in which companies begin to cooperate. Of course, companies that accept responsibility and begin cooperating sooner will have a greater chance to provide substantial assistance when it is most needed; the longer a company waits to cooperate, the less likely it is that the cooperation will have value to the division. That said, companies that begin cooperating later in the process still have a chance to mitigate the consequences of their wrongdoing – they can and often do provide substantial assistance by expanding the scope of our investigation or reporting an entirely new conspiracy. If a company that begins cooperating later provides substantial assistance, we will take that cooperation into account when making our sentencing recommendations.

When we negotiate corporate plea agreements we are also prepared to discuss the appropriate treatment of company executives and employees. We have said before and will continue to insist that the most culpable employees face the consequences of their crimes. They must accept responsibility and plead guilty or they will face indictment and trial. For other employees—those who seek protection through the non-prosecution agreements usually included in the division's corporate plea agreements—we expect full cooperation, and will revoke that protection for anyone who does not fully and truthfully cooperate with our investigations.

When we agree to include individuals in the non-prosecution provisions of a corporate plea agreement—so called “carve ins”—we need to specify those who are not entitled to that protection. We refer to those individuals as being excluded, or “carved out,” of the corporate plea agreement. As many of you are aware, last year we decided to limit carve-outs from corporate plea agreements to those we have reason to believe were involved in criminal wrongdoing and who are potential targets of our investigation. To avoid publicly identifying those persons unless and until we charge them, we list their names in a confidential addendum to the corporate plea agreement, and ask the court to seal it.

Carve-out decisions will continue to be made on an employee-by-employee basis. Some have suggested that the number of carve-outs should be tied exclusively to the order in which companies come forward to accept responsibility and offer cooperation. That is not how we look

at things. We apply the Principles of Federal Prosecution and consider such factors as the employee's role in the conspiracy, seniority in the company, and the assistance the employee is able to provide in bringing other wrongdoers to justice. Our decisions are based ultimately on these factors, not mechanically on the order in which the company chose to accept responsibility or chose to cooperate.

Obviously, the easiest way for companies and their executives to avoid prosecution is not to commit crimes. There has been a lot of important work done recently by the International Chamber of Commerce, the ABA, and others to encourage corporations to step up their compliance efforts. We think that is great. Effective compliance programs minimize the chance that companies will conspire to fix prices. And they maximize the chance for a company guilty of price fixing to find out about the conspiracy early enough to qualify for corporate leniency or otherwise cooperate with our investigation.

Some have argued that the mere existence of a compliance program should be sufficient, in and of itself, to avoid prosecution, secure a non-prosecution agreement, or otherwise dramatically reduce the penalties for criminal antitrust violations. That is something of a stretch. The fact that the company participated in a cartel, and did not detect it until after the investigation began, makes it difficult for the company to establish that its compliance program was effective. It is unlikely that a corporate defendant's pre-existing compliance and ethics program will be considered effective enough to warrant a slap on the wrist when it failed to prevent the company from violating the antitrust laws. This is a view we share with other parts of the department that prosecute corporate crimes.

We also expect companies to take compliance seriously once they have pleaded guilty or have been convicted. Taking compliance seriously includes making an institutional commitment to change the culture of the company. Companies should be fostering a corporate culture that encourages ethical conduct and a commitment to compliance with the law.

As Deputy Attorney General Cole has said, corporate compliance starts at the top. The board of directors and senior officers must set the tone for compliance to ensure that the

company's entire managerial workforce not only understands the compliance program but also has the incentive to actively participate in its enforcement. Employees should be encouraged to report or seek guidance about potential criminal conduct without fear of retaliation, and there should be appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect that conduct.

Guilty companies sometimes want to continue to employ culpable senior executives who do not accept responsibility and are carved out of the corporate plea agreement, while at the same time arguing that their compliance programs are effective and their remediation efforts laudable. That creates an obvious tension. It is hard to imagine how companies can foster a corporate culture of compliance if they still employ individuals in positions with senior management and pricing responsibilities who have refused to accept responsibility for their crimes and who the companies know to be culpable. If any company continues to employ such individuals in positions of substantial authority; or in positions where they can continue to engage directly or indirectly in collusive conduct; or in positions where they supervise the company's compliance and remediation programs; or in positions where they supervise individuals who would be witnesses against them, we will have serious doubts about that company's commitment to implementing a new compliance program or invigorating an existing one. Indeed, the Sentencing Guidelines go so far as to suggest that companies that do so cannot be said to have an "effective" compliance program. In such cases, the division will consider seeking court-supervised probation as a means of assuring that the company devises and implements an effective compliance program. We reserve the right to insist on probation, including the use of monitors, if doing so is necessary to ensure an effective compliance program and to prevent recidivism.

The division recently faced a situation like this in our prosecution of AU Optronics. The jury found that AUO, its subsidiary, and its executives broke the law, and along with their conspirators, reaped an illicit gain of at least \$500 million to the detriment of American consumers. While all of AUO's corporate co-conspirators recognized that their conspiracy was illegal and accepted responsibility for their participation in that scheme, AUO refused even to acknowledge that its participation in the same agreement was, or should be considered, illegal.

Far from demonstrating a commitment to future antitrust compliance, AUO continued to employ convicted price fixers and indicted fugitives. In those circumstances, the division argued that not only was probation necessary, but also a compliance monitor was appropriate. The district court agreed. It sentenced AUO and its U.S. subsidiary to three years of probation. The terms of probation required the companies to develop and implement an effective compliance and ethics program. And the companies were required to accept a compliance monitor whose job it is to supervise the implementation of the program and report back to the court and the division.

Convicted companies that implement effective compliance programs should not need to see us again. Companies that fail to do so, however, should expect significant penalties if we catch them again. For example, Bridgestone pleaded guilty several years ago for its role in the marine hose cartel. But at that time, Bridgestone did not disclose that it had also participated in a conspiracy to fix the price of anti-vibration rubber auto parts. Bridgestone's lackadaisical approach to compliance, demonstrated by its failure to disclose its participation in a second conspiracy, was treated as an aggravating factor in the calculation of its criminal fine when it pleaded guilty for its auto parts crimes. It was placed on probation and fined \$425 million, the fourth-largest fine the division has ever obtained. The fine amount increased by over \$100 million as a result of Bridgestone's failure to disclose the second conspiracy.

The bottom line is pretty simple. If a company commits an antitrust crime, it faces serious consequences here in the United States. A company can mitigate those consequences by coming forward promptly, cooperating completely, and taking the steps necessary to ensure that the conduct does not reoccur. The citizens of the United States are entitled to competitive markets free from collusion. We will work tirelessly to ensure that the benefits of competition continue to flow to the American consumer.