U.S. policy and practice in pursuing individual accountability for cartel conduct: A preliminary critique

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The extent of individual accountability for cartel conduct in the United States, as elsewhere, may be more limited than some might have one believe. The chances are that individuals responsible for cartel offenses will not be prosecuted and that corporate fines will not result in internal disciplinary action being taken against them. Yet few would disagree with the principle that all who are responsible for serious cartel conduct should be held accountable. Further empirical investigation is required in order to test fully the extent to which the DOJ's approach to anticartel enforcement achieves individual accountability. Such an investigation is warranted with regard to the influence of the U.S. model around the world and the strength of advocacy by the U.S. authorities as to its merits.

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AUTHORS' NOTE: *We are grateful to John Connor, Bob Lande, and Richard Gruner for helpful responses to our requests for information about aspects of the U.S. system and to Kathryn Tomasic and Janette Nankivell for research assistance. The usual disclaimers apply.*

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I. INTRODUCTION—INDIVIDUAL ACCOUNTABILITY AS A PARADIGM FOR ANTICARTEL ENFORCEMENT

Individual accountability is a foundation of social control in Western democracies. Although the contours of the concept of individual accountability are context-dependent and widely debated, the orthodox principle is that individuals are the quintessential actors in society and should be accountable for their actions.[1]

The U.S. Department of Justice (DOJ) prides itself on having championed a "global movement towards individual accountability" for cartel activity through the application of criminal sanctions, particularly jail time, for individual offenders.[2] However, with only a handful of exceptions, the DOJ's contemporary policy and performance record with respect to criminal cartel enforcement have escaped critical scrutiny from U.S. commentators.[3] Indeed, most tend to lionize the Antitrust Division's efforts to eradicate cartels from the U.S. and global economies.[4] This may be attributed in part to the facially

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[1] BRENT FISSE & JOHN BRAITHWAITE, CORPORATIONS, CRIME AND ACCOUNTABILITY ch. 1 (1994).

[2] Scott Hammond, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Charting New Waters in International Cartel Prosecutions, Presentation to the 20th Annual National Institute on White Collar Crime, ABA Criminal Justice Section and ABA Center for Continuing Legal Education (Mar. 2, 2006), at 2 [hereinafter Hammond, Charting New Waters]; Scott Hammond, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., The Evolution of Criminal Antitrust Enforcement over the Last Two Decades, Presentation to the 24th Annual National Institute on White Collar Crime, ABA Criminal Justice Section and ABA Center for Continuing Legal Education (Feb. 25, 2010) at 4, 6-9 [hereinafter Hammond, Evolution].

[3] For exceptions, see John M. Connor, *Anti-Cartel Enforcement by the DOJ: An Appraisal*, 5 COMPETITION L. REV. 89 (2008); Maurice E. Stucke, *Am I a Price Fixer? A Behavioural Economics Analysis of Cartels*, *in* CRIMINALISING CARTELS: CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT ch. 12 (Caron Beaton-Wells & Ariel Ezrachi eds., 2011); D. Daniel Sokol, *Neo-Chicago Antitrust, Cartel Enforcement and Corporate Compliance*, ANTITRUST L.J. (forthcoming).

[4] As reflected in the observation by two commentators: "People in the antitrust world disagree about many things, but it is extremely difficult to find responsible critics who do not applaud the U.S. government's anti-

impressive statistical record of the Division in criminal antitrust cases over the last decade. Statistically it has been for many years (and, in the absence of criminal liability in the European Union, is likely to remain for many years) the world leader in terms of the number of criminal cases brought against cartel offenders.[5]

This article tests in a preliminary way the extent to which individual accountability is reflected in current U.S. anticartel policy and practice, focusing on:

- the policy reasons given by U.S. authorities for subjecting individuals to criminal sanctions for cartel conduct (section II);
- the exercise of enforcement discretion with respect to prosecution, leniency, and plea bargaining in the United States (section III);
- the nature of individual sanctions for cartel conduct in the United States (section IV); and
- the nature of corporate sanctions for cartel conduct in the United States (section V).

The analysis is necessarily preliminary. A definitive analysis would require an empirical investigation of a scale and kind that was not possible for the purposes of this article. Nevertheless, on even a preliminary analysis, it is evident that questions hang over the extent to which individual accountability is in fact pursued or achieved in anti-cartel enforcement by the DOJ. In the conclusion, we map the

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cartel program. We strongly agree with this almost-unanimous consensus and are second to no one in our appreciation of the DOJ's anti-cartel activity. In terms of taxpayer dollars well spent, the program surely is one of the most outstanding in all of government." Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 BYU L. REV. (forthcoming). *See also* Donald C. Klawiter, *After the Deluge: The Powerful Effect of Substantial Criminal Fines, Imprisonment and Other Penalties in the Age of International Criminal Enforcement*, 69 GEO. WASH. L. REV. 745 (2001); David A. Balto, *Antitrust Enforcement in the Clinton Administration*, 9 CORNELL J. L. & PUB. POL'Y 61 (1999).

[5] The decrease in the total number of individuals charged with cartel violations since the mid-1990s has been attributed to a shift in prosecutions away from bid-rigging conspiracies and toward large-scale price fixing cartels, the latter of which tend to have a smaller number of corporations and individuals involved in them than the former. *See* Connor, *supra* note 3, at 109–10.

steps that would need to be taken to test thoroughly the DOJ claim to have championed individual accountability for cartel conduct (section VI).

By "accountability" we mean simply the state of being held to account for one's conduct.[6] Being "held to account" requires that an actor explain his or her conduct and then be sanctioned for that conduct after account is taken of the explanation given or not given by the actor. The sanctions imposed may be positive or negative and are always to some extent nonmonetary; accountability entails being censured or praised as a member of a social community.[7] Accountability is not necessarily fault-based. For example, failure to perform an assigned organizational function when expected to do so may result in accountability on that basis alone.

Accountability may be corporate as well as individual. It is a mistake to conceive of accountability as necessarily relating only to individuals.[8] Corporations are subject to criminal liability, and there are strong underlying policy reasons why that should be so.[9] It is also a mistake to conceive of accountability as necessarily relating only to corporations: that conception radically violates the orthodox principle of individual accountability.[10]

The scope of this article is limited to the design and application of sanctions for cartel conduct. It does not attempt to address many

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[6] "Accountability" and "responsibility" are closely related concepts. Technical distinctions can be drawn between them but are of little moment to enforcement strategy.

[7] *See generally* CHRISTOPHER HARDING, CRIMINAL ENTERPRISE: INDIVIDUALS, ORGANIZATIONS AND CRIMINAL RESPONSIBILITY ch. 1 (2007); FISSE & BRAITHWAITE, *supra* note 1, at ch. 1; H.L.A. HART, PUNISHMENT AND RESPONSIBILITY—ESSAYS IN THE PHILOSOPHY OF LAW (2d ed. 2008); TONY HONORÉ, RESPONSIBILITY AND FAULT (1999); PETER CANE, RESPONSIBILITY IN LAW AND MORALITY (2002); R. JAY WALLACE, RESPONSIBILITY AND THE MORAL SENTIMENTS (1994); MARK BOVENS, THE QUEST FOR RESPONSIBILITY (1998).

[8] FISSE & BRAITHWAITE, *supra* note 1, ch. 2.

[9] *See* CARON BEATON-WELLS & BRENT FISSE, AUSTRALIAN CARTEL REGULATION: LAW, POLICY AND PRACTICE IN AN INTERNATIONAL CONTEXT § 7.2 (2011).

[10] FISSE & BRAITHWAITE, *supra* note 1, ch. 3.

other issues, including liability rules,[11] powers of investigation, or enforcement methods that conduce to the shifting by senior management of blame and liability to lesser employees.[12]

II. INDIVIDUAL ACCOUNTABILITY AS A MATTER OF DOJ POLICY

Over the past ten to fifteen years, U.S. authorities and commentators have promoted the policy of criminal sanctions for individual cartel offenders, particularly through jail time. This policy has been justified on the grounds that it is "absolutely critical for effective deterrence and enforcement."[13] It has not been justified generally as a policy directed at achieving individual accountability for cartel conduct. As explained in sections II.A and II.B below, policies directed at enhanced deterrence and enforcement are not the same as—and may be inconsistent with—a policy directed at individual accountability.

A. Individual sanctions as a means of achieving deterrence

It is often asserted by U.S. enforcement officials that the penal approach taken by the DOJ to individuals involved in cartel conduct, particularly the uncompromising stance taken on jail time as an appropriate sanction, has been effective in deterring such conduct, at least within U.S. borders.[14] There are at least two major problems with such assertions.

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[11] *See* BEATON-WELLS & FISSE, *supra* note 9, at ch. 6.

[12] *See* WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY ch. 5 (2006).

[13] William Kolasky, *Criminalising Cartel Activity: Lessons from the U.S. Experience*, 12 COMPETITION & CONSUMER L.J. 207, 207 (2004). *See also* Hammond, Evolution, *supra* note 2, at 4, 6–9; Donald I. Baker, *Punishment for Cartel Participants in the United States: A Special Model*, *in* CRIMINALISING CARTELS, *supra* note 3, at ch. 2 [hereinafter Baker, *Punishment for Cartel Participants*]; Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid Rigging*, 69 GEO. WASH. L. REV. 693 (2001) [hereinafter Baker, *Criminal Law Remedies*]; Gregory J. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime*, 5 EUR. COMPETITION J. 5, 31–33 (2009); Terry Calvani & Torello H. Calvani, *Custodial Sanctions for Cartel Offences: An Appropriate Sanction in Australia?*, 17 COMPETITION & CONSUMER L.J. 119, 127–28 (2009).

[14] Scott Hammond, Deputy Assistant Att'y Gen., U.S. DOJ, Antitrust Div., Cornerstones to an Effective Leniency Program, Presentation to the ICN

First, despite record-level prosecutions, convictions, and penalties for cartel activity in the United States, there are in fact few signs that "optimal"[15] deterrence has been reached. If anything, there are signs that the number, scale, and harmfulness of discovered cartels are increasing.[16] Second, and relatedly, the body of empirical work that has sought to test the relationship between individual engagement in

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Workshop on Leniency Programs (Nov. 23–24, 2004), at 3 [hereinafter Hammond, Cornerstones]; Thomas O. Barnett, Former Assistant Att'y Gen., U.S. DOJ, Antitrust Div., Seven Steps to Better Cartel Enforcement, Speech at the 11th Annual Competition Law & Policy Workshop, EUI (June 2, 2006), *available at* http://www.justice.gov/atr/public/speeches/216453.htm; Hammond, Charting New Waters, *supra* note 2, at 7–8; Scott Hammond, Deputy Assistant Att'y Gen., U.S. DOJ, Antitrust Div., Recent Developments, Trends and Milestones in the Antitrust Division's Criminal Enforcement Program, Address before the Cartel Enforcement Roundtable, ABA Section of Antitrust Law (Nov. 16, 2007); Baker, *Punishment for Cartel Participants*, *supra* note 13, at ch. 2; Belinda A. Barnett, Senior Counsel to the Deputy Assistant Att'y Gen. for Criminal Enforcement, U.S. DOJ, Antitrust Div., Criminalization of Cartel Conduct—The Changing Landscape, Speech at Joint Federal Court of Australia/Law Council of Australia (Business Law Section) Workshop (Apr. 3, 2009).

15 "Optimal deterrence" is an opaque and problematic notion that is the subject of diverse interpretation. One broad assumption in the literature appears to be that an "optimal" penalty is one that "promises, on average, to take away the financial gains that would otherwise accrue to cartel members." Organisation for Economic Co-operation and Development (OECD), Directorate for Financial, Fiscal and Enterprise Affairs, Competition Committee, Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws ¶ 35 DAFFE/COMP(2002)7 (Apr. 9, 2002), *available at* http://www.oecd.org/dataoecd/16/20/2081831.pdf. *See also* Peter M. Whelan, *A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law*, 4 Competition L. Rev. 7 (2007); Wouter P.J. Wils, *The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis*, 30 World Competition L. & Econ. Rev. 197 (2007); Wouter P.J. Wils, *Optimal Antitrust Fines: Theory and Practice*, 29 World Competition L. & Econ. Rev. 183 (2006). Conceived in those terms, it is difficult to see how optimal deterrence has any application in explaining the effectiveness of jail as a sanction. *But see* Werden, *supra* note 13.

16 *See* John M. Connor, *The United States Department of Justice Antitrust Division's Cartel Enforcement: An Appraisal and Proposals* 9 (Am. Antitrust Inst. Working Paper No. 08-02, June 10, 2008) (describing this as a "major paradox"). *See also* Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 Competition Pol'y Int'l, Fall 2010, at 3, 21, *available at* https://www

cartel conduct and the prospect of legal sanctions provides little support for classical deterrence theory, with its reliance on "the supercharged deterrent of jail"[17] to induce greater compliance. This theory has been found to have "no basis in empirical evidence about why people actually participate in cartel behavior in the complexity of everyday business life."[18] From empirical studies in both cartel and other contexts there is substantial evidence for the view that cartel participation is likely to be influenced as much, if not more, by dispositional, organizational, situational, and cultural factors, as it is by the prospect of legal sanctions, including the ultimate sanction of jail.[19]

.competitionpolicyinternational.com/antitrust-sanctions/; Stucke, *supra* note 3. *Cf.* the more positive slant offered in John M. Connor, Albert A. Foer & Simcha Udwin, *Criminalizing Cartels: An American Perspective*, 2 NEW J. EUR. CRIM. L. 199, 215 (2010) (under the heading *Criminalization Works*).

[17] Christine Parker, *Criminal Cartel Sanctions and Compliance: The Gap Between Rhetoric and Reality*, *in* CRIMINALISING CARTELS, *supra* note 3, at 239. Note, in particular, Parker's critique of the findings in OFFICE OF FAIR TRADING, THE DETERRENT EFFECT OF COMPETITION ENFORCEMENT BY THE OFT: DISCUSSION PAPER 244 (No. OFT 963, Nov. 2007). Even the OECD, one of the strongest proponents of tough measures to deter cartel conduct, has conceded that "there is no systematic empirical evidence to prove the deterrent effects of criminal sanctions or, more importantly, to assess whether the marginal benefit of introducing sanctions against individuals . . . exceeds the additional costs that a system of criminal sanctions entails." OECD, HARD CORE CARTELS: THIRD REPORT ON THE IMPLEMENTATION OF THE 1998 COUNCIL RECOMMENDATION 27 (2005). *Cf.* the view expressed by Scott Hammond, Deputy Assistant Att'y Gen., U.S. DOJ, Antitrust Div., that the deterrence superiority of prison over company fines is so obvious that no empirical verification is needed, as reported in Connor, *supra* note 3, at 109 n.121.

[18] Parker, *supra* note 17.

[19] *See* Christine E. Parker & Vibeke L. Nielsen, *How Much Does It Hurt? How Australian Businesses Think About the Costs and Gains of Compliance with the Trade Practices Act*, 32 MELB. U. L. REV. 554 (2008); Barry J. Rodger, *A Study of Compliance Post-OFT Infringement Action*, 5 EUR. COMPETITION J. 65 (2009); Stucke, *supra* note 3; Utpal Bhattacharya & Cassandra D. Marshall, Do They Do It for the Money? (Nov. 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1356118; Kai-D. Bussman & Markus M. Werle, *Addressing Crime in Companies: First Findings from a Global Survey of Economic Crime*, 46 BRIT. J. CRIMINOLOGY 1128 (2006). There is also a vast theoretical and empirical literature on the complexity of motivations underpinning decisions to obey or disobey the law. *See, e.g.*, Susanne Karstedt & Stephen Farrall, *The Moral Economy of Everyday Crime: Markets, Consumers and Citizens*, 46 BRIT. J. CRIMINOLOGY 1011 (2006).

More fundamentally, a policy favoring criminal sanctions as a mechanism for deterring individual offenders is not the same as a policy favoring individual accountability. The aim of deterring individuals from engaging in certain conduct is separate from the aim of holding those individuals found to have engaged in the conduct to account and sanctioning them accordingly. Deterrence operates ex ante while accountability operates ex post the conduct. The two policies are complementary rather than substitutable.

The paradigm of individual accountability outlined in the introduction to this article does not imply adherence to any particular theory of punishment. It thus accommodates utilitarian approaches to general deterrence that depart from fault-based liability or proportionate punishment. However, deterrence clashes with individual accountability where the means of deterrence used is exclusively enterprise or corporate liability. An exclusively enterprise or corporate liability approach is advocated by some law and economics theorists,[20] but not by the DOJ.[21]

B. *Individual sanctions as a means of promoting enforcement*

To a significant degree, the justification given in the United States for criminal sanctions against individuals is instrumental in nature. The instrumentalism of the policy is evident in at least three ways.

First, the threat of criminal sanctions and jail in particular is seen as vital to ensuring that individuals cooperate with the authorities and provide evidence against their employers, fellow employees, and coconspirators in return for a reduced sentence.[22]

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[20] *See, e.g.*, KENNETH G. ELZINGA & WILLIAM BREIT, THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS ch. 7 (1976); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652 (1983); Richard Posner, *An Economic Theory of Criminal Law*, 85 COLUM. L. REV. 1193, 1201–08 (1985); Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232 (1985).

[21] *See, e.g.*, Werden, *supra* note 13.

[22] Kolasky makes the point that "there is no other effective way to persuade lower level employees to cooperate in an investigation and to supply evidence that will incriminate their superiors, their employers and their co-

Second, in the leniency context, criminal liability is seen as valuable in incentivizing corporations to apply for leniency in order to secure immunity from prosecution for their officers and employees.[23] It is also said to contribute to alignment of individual employee and corporate employer interests, enabling a company to count on the cooperation of its employees in return for derivative immunity.[24] When leniency is not available, the DOJ's insistence on jail terms is said to encourage companies to cooperate early to minimize the number of carve-outs of individuals who could otherwise be subject to jail sentences (see further section III below).[25]

Third, criminal sanctions are seen as conducive to applications for leniency by individual employees independent of their employers[26] and to the potential of such applications to destabilize cartels.[27]

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conspirators." *See* Kolasky, *supra* note 13, at 211. *See also* Thomas Barnett, *supra* note 14; Hammond, Cornerstones, *supra* note 14, at 3. If an individual fails to comply with cooperation obligations under a plea agreement, the agreement is rendered void and the DOJ is free to prosecute as well as to use information provided by the individual against him or her in a criminal trial. *See* Scott Hammond, Deputy Assistant Att'y Gen., U.S. DOJ, Antitrust Div., The U.S. Model of Negotiated Plea Agreements: A Good Deal with Benefits for All, Address before the OECD Competition Committee Working Party No. 3, at 9 (Oct. 17, 2006) [hereinafter Hammond, The U.S. Model].

[23] Under the U.S. DOJ Corporate Leniency Policy, if a corporation qualifies for Part A leniency (i.e., if the corporation reports before an investigation has begun), all directors, officers and employees of the corporation who admit their involvement and cooperate with the investigation also receive leniency. *See also* Hammond, Charting New Waters, *supra* note 2, at 9; Scott Hammond, Deputy Assistant Att'y Gen., U.S. DOJ, Antitrust Div., When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?, Presentation to the 20th Annual National Institute on White Collar Crime, ABA Criminal Justice Section and ABA Center for Continuing Legal Education, San Francisco (Mar. 8, 2001) at 6 [hereinafter Hammond, Calculating the Costs and Benefits].

[24] Baker, Criminal Law Remedies, *supra* note 13, at 704. However, this is undermined to an extent by the carve-out policy, discussed *infra* section III.

[25] Hammond, Charting New Waters, *supra* note 2, at 9.

[26] Hammond, Cornerstones, *supra* note 14, at 3.

[27] This view continues to be held despite the fact that the individual leniency policy is "evidently little used." *See* Connor, *supra* note 3, at 97.

These justifications for criminal sanctions are directed at the enhancement of detection and prosecution strategies. They are not justifications grounded in principles of individual accountability. Indeed, such strategies have the potential to undermine individual accountability, particularly when they are not administered in a fully transparent way, as explained in section III.

III. INDIVIDUAL ACCOUNTABILITY AS A MATTER OF DOJ ENFORCEMENT DISCRETION

Since the mid-1990s, the Antitrust Division has won ninety-nine per cent of its criminal cartel cases,[28] the majority of individual defendants have been sentenced to jail, and there has been a steady upward trajectory in the length of jail terms imposed. Yet, from the perspective of individual accountability, the DOJ's record is difficult to assess and in some respects appears unsatisfactory.

High conviction rates and custodial sentences against individual cartel defendants are not necessarily an appropriate measure of prosecutorial effectiveness in achieving individual accountability. They reveal little if anything about the DOJ's processes for selecting which individuals to prosecute and for negotiating pleas. To a degree these processes lack transparency.[29]

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[28] *Id.* at 101. *Cf.* the hung jury in the price fixing trial of Gary Swanson. *See* Robert H. Bunzel & Howard Miller, *Defending "The Last Man Standing": Trench Lessons from the 2008 Criminal Antitrust Trial* United States v. Swanson, ANTITRUST SOURCE, June 2008, http://www.bztm.com/pdf/Last_Standing.pdf. *Compare also* the high profile failure in the single cartel trial held in the United Kingdom to date. *See* David Teather, *BA Price-Fixing Trial Collapses*, GUARDIAN, May 10, 2010; Andrew Hill, *BA Drama Has the Worst Possible Ending for the OFT,* FIN. TIMES, May 11, 2010; Julian Joshua, *D.O.A.: Can the U.K. Cartel Offence be Resurrected?*, *in* CRIMINALISING CARTELS, *supra* note 3, at ch. 6.

[29] *See generally* Warren Grimes, *Transparency in Federal Antitrust Enforcement*, 51 BUFF. L. REV. 937 (2007). *Cf.* Hammond, The U.S. Model, *supra* note 22, at 2 ("The Division has a tradition of maximizing transparency and predictability in its cartel enforcement program. Examples of this include: transparent standards for opening criminal antitrust investigations; transparent standards for deciding whether to file criminal antitrust charges; transparent prosecutorial priorities; transparent application of the Division's Corporate Leniency Policy; transparent policies relating to the negotiation of plea agreements; and transparent policies on the application of the antitrust Sentencing Guidelines.").

It appears that the proportion of individuals not prosecuted despite the DOJ's having evidence of their involvement in cartel conduct is significant:

> It is obvious that each of firms [sic] convicted had at least one and usually several managers responsible for operating the cartel. Yet it is clear that the Division does not indict all guilty individual price fixers in a company convicted for price-fixing. Moreover, in a large proportion of cases, no individuals are charged. To some extent, in order to conserve prosecutorial resources, it is impractical to charge all the underlings involved in a conspiracy; from the point of view of general deterrence, charging the leaders may suffice. However, it is evident that the Division does not indict all the leaders either.[30]

In the period 1990–2007, the DOJ secured guilty pleas from companies involved in fifty-three international cartels, but in forty-seven percent of those cartels, no individuals were indicted.[31] The DOJ's published statistics for the period 2000–09 also suggest that a high proportion of individuals are not being charged. For criminal cases filed over this period, the proportion of individuals charged to corporations charged was, on average (across the period), 205%, i.e., a ratio of approximately 2:1.[32] In one of the most far-reaching global cartel cases, as of November 2010, the U.S. DOJ had charged nineteen airlines (all of which had pleaded guilty) and had orchestrated the impo-

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[30] Connor, *supra* note 16, at 35.

[31] Connor, *supra* note 3, at 112 n.137.

[32] DOJ, Antitrust Div., Workload Statistics for FY 1999–2009, at 4 (March 2010), *available at* http://www.justice.gov/atr/public/workstats.pdf. The ratio was much lower in the period 1981–97; in most years less than one individual per corporation was charged. *See* Stephen Calkins, *Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties*, 60 LAW & CONTEMP. PROBS. 127, 140 (1997). Hammond concedes that in the mid-1990s it was typical for the DOJ "to prosecute only the single most culpable employee from each foreign company prosecuted." Hammond, Evolution, *supra* note 2, at 8. However, he asserts that "during the last decade, the Antitrust Division has routinely prosecuted multiple individuals from each corporate defendant, and over time, the Antitrust Division has tended to prosecute greater numbers of individuals from each corporate defendant." *Id.* at 8. If "multiple" is intended to imply more than two or three, then the first part of Hammond's assertion is misleading. The second part of his assertion (that "the Antitrust Division has tended to prosecute greater numbers of individuals from each corporate defendant") cannot be verified from the published DOJ statistics.

sition of U.S. $1.7 billion in fines. Yet, to date, only seventeen executives have been charged.[33]

These figures are difficult to reconcile with the U.S. DOJ policy on the desirability of prosecuting corporate officers in addition to corporations:

> Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Only rarely should provable individual culpability not be pursued, particularly if it relates to high-level corporate officers, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation.[34]

The DOJ does not explain its decisions not to prosecute certain individuals.[35] There is no way to be confident that prosecutorial selection does not involve a tendency to select "soft targets" or to avoid prosecuting individuals perceived as likely to engage in prolonged

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[33] *See* Press Release, U.S. DOJ, Former Executives from Two Japanese Airlines Indicted in Conspiracy to Fix Rates on Air Cargo Shipments (Nov. 16, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/264218.pdf.

[34] U.S. DOJ, Principles of Federal Prosecution of Business Organizations, 9 U.S. Attorneys' Manual ¶ 28.200B (Aug. 2008).

[35] Moreover, there are differences of opinion on the extent to which the DOJ has pursued senior corporate officers as opposed to junior employees as individual antitrust defendants. One study has reported that the majority of individual defendants convicted in antitrust cases during the period 1955–97 were directors, owners or other corporate officers. *See* Joseph Gallo, Kenneth Dau-Schmidt, Joseph Craycraft & Charles Parker, *Department of Justice Antitrust Enforcement, 1955–1997: An Empirical Study*, 17 Rev. Indus. Org. 75, 104–06 (2000). Connor has stated that this finding is "still true today." Connor, *supra* note 3, at 109 n.121. *Cf.* the view that the "U.S. Antitrust Division's current enforcement policies under-deter because the Government, rather than sentencing senior executives, prosecutes the mid-level sales executives and marketing directors involved in price fixing, offers them short sentences in return for their guilty pleas, and appears altogether indifferent to whether corporations ultimately terminate or impose any disciplinary measures whatsoever on these individuals." Tefft W. Smith, Comments for the Antitrust Modernization Commission Hearing on Criminal Antitrust Remedies (Nov. 3, 2005), cited in Ginsburg & Wright, *supra* note 16, at 19.

and expensive litigation.[36] It would be surprising if DOJ decision making was not influenced by such considerations given the demands of such litigation, the DOJ's poor track record at trial, and its finite resources.[37]

In large part, the failure to prosecute individuals can be attributed to the DOJ's corporate leniency policy and its plea carve-out policy.[38] The impact of these policies emerges from Connor's analysis. In relation to the leniency policy, he explains:

> The majority of all cartels prosecuted by the U.S. since 1993 contain a corporate amnesty recipient; in recent years the proportion is higher. Subject to an admission of guilt and complete cooperation with the Division's investigation, cartel managers who are employees of a successful amnesty applicant are granted immunity. Because the typical price-fixing cartel is comprised of roughly four firms, it follows that up to one-fourth of all guilty cartel managers are neither charged nor sentenced as a matter of policy.[39]

The impact of the Amnesty Plus policy must also be considered:

> among the guilty firms that are the second or third to apply for leniency, a significant share qualifies for Amnesty Plus, which also gives a pass to all of its guilty cartel managers (in this instance, managers of two cartels).[40]

For the remaining firms that do not qualify for either type of amnesty, plea bargaining limits the number of managers that will be carved out

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[36] Connor, *supra* note 16, at 25; Connor, *supra* note 3, at 101.

[37] *See* F. Joseph Warin, David P. Burns & John W.F. Chesley, *To Plead or Not to Plead? Reviewing a Decade of Criminal Antitrust Trials*, ANTITRUST SOURCE, July 2006, at 1, 2, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Jul06_FullSource7_21.authcheckdam.pdf (reporting that for the period 1996–2005, the DOJ charged 367 defendants with antitrust offenses, of whom 307 pleaded guilty, 15 had their cases dismissed, and of the 45 that went to trial, 23 were not convicted (either acquitted or discharged after a mistrial)—a conviction rate of 49%). According to Connor, "it is doubtful that the Division has sufficient resources to prepare for and argue more than about five price fixing cases per year." Connor, *supra* note 16, at 27.

[38] "Carve-out" is the term used to indicate that when a firm is offered partial leniency, some of the most culpable managers will still be subject to criminal indictments. For amnestied firms there are no carve-outs.

[39] Connor, *supra* note 3, at 112 (citations omitted).

[40] *Id*.

of the plea agreement and "with sufficient promises of cooperation in a prosecution, a deal may result in no carve outs." As Connor points out:

> Since the Vitamins prosecutions, the Division has suggested that its policy will be to carve out at least two or three officers, and that that number will increase over time. However, this goal seems to apply only to a couple of the ringleaders in selected high profile cases.[41]

In an analysis of a sample of 117 sentencing memorandums on non-amnestied firms culled from the Division Web site, Connor found that 54% of all corporate guilty pleas had zero carve-outs. For firms with carve-outs, the mean number was 2.2 executives, and there is no clear evidence of an upward trend over time.[42]

Connor's analysis indicates that the amnesty and plea bargain policies have a significant impact on the extent to which individual accountability is in fact sought after and achieved by the U.S. DOJ. However, the exact impact is impossible to judge. The DOJ does not release information about the number of amnesty applications it receives, the proportion it accepts, or the number and identities of individuals who receive derivative protection from a corporate application.

The DOJ has published guidelines that set out the considerations relevant to the negotiation of plea agreements.[43] However, as might be expected, a number of unwritten considerations are also influential in such negotiations.[44] In particular, there appears to be scope for corporate cartelists to agree to more employee carve-outs and higher employee penalties in return for reduced corporate fines.[45] A number of the speeches made by DOJ officials refer to the carve-out policy.[46]

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[41] *Id.*

[42] *Id.*

[43] The guidelines for entering into plea bargaining negotiations are found in U.S. DOJ, Principles of Federal Prosecution, 9 U.S. Attorneys' Manual, ¶ 27.420 (1997). These guidelines apply to all federal offenses.

[44] John M. Connor, *A Critique of Partial Leniency for Cartels by the U.S. Department of Justice* (Purdue Univ. Working Paper, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=977772.

[45] *Id.*

[46] Hammond, Charting New Waters, *supra* note 2; Hammond, The U.S. Model, *supra* note 22; Scott Hammond, Deputy Assistant Att'y Gen., U.S.

These speeches highlight the "opportunity for early cooperating companies to minimize the number of individual employees carved out of the non-prosecution provisions of a corporate plea agreement" and "the possibility of more favorable deals for those executives carved out of plea agreements entered into with early cooperating companies because these executives, like their employers, are in a position to offer valuable and timely cooperation."[47] The scope for immunizing individual employees through corporate plea bargains is difficult to reconcile with U.S. DOJ policy:

> Although special circumstances may mandate a different conclusion, prosecutors generally should not agree to a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees . . . . Prosecutors should rarely negotiate away individual criminal liability in a corporate plea.[48]

The DOJ publishes only a small number of all plea agreements and sentencing memoranda relating to antitrust defendants.[49] These documents do not identify those individuals who have or have not been carved out or the basis on which the carve-out decisions were made.[50] The only explanation given in Division speeches about the basis for carve-out decisions is that individuals who may be carved

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DOJ, Antitrust Div., Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Presentation to the 54th Annual American Bar Association Section of Antitrust Law Spring Meeting (Mar. 29, 2006) [hereinafter Hammond, Second-In Cooperation]; Hammond, Calculating the Costs and Benefits, *supra* note 23.

[47] Hammond, The U.S. Model, *supra* note 22, at 10; Hammond, Second-In Cooperation, *supra* note 46.

[48] U.S. DEP'T OF JUSTICE, *supra* note 34.

[49] *See* Connor, *supra* note 16, at 25 n.78 ("In theory, one could visit the files of every District Court in which a cartel case had been conducted, examine their public files, and retrieve copies of all such memoranda. However, not only would this be prohibitively expensive, many courts do not retain paper copies at all because they lack the storage space. An assiduous search of the Division's Web site turned up less than 130 published sentencing agreements dated from 1995 to the present . . . about one fourth of the agreements prepared and submitted to the courts during that period.").

[50] Indeed, the DOJ guidelines strongly caution federal prosecutors against references in public filings and proceedings to "uncharged wrongdoers." *See* U.S. DEP'T OF JUSTICE, *supra* note 34, ¶ 9-27.760.

out "can include culpable employees, employees who refuse to cooperate with the Division's investigation and employees against whom the Division is still developing evidence."[51] The extent to which the negotiating company has input to DOJ assessments of employee culpability for the purposes of carve-out decisions, and the influence of any such input, are not publicly known.

IV. INDIVIDUAL ACCOUNTABILITY THROUGH INDIVIDUAL SANCTIONS

The DOJ's sanction of choice for individual antitrust defendants is a jail sentence.[52] However, a policy of individual accountability does not dictate that imprisonment be imposed automatically in all cases. Other sanctions may be appropriate and as effective, either in the alternative or in addition to a jail sentence. A banning or disqualification order is one such sanction.

The U.S. DOJ does not appear to use banning or disqualification orders as part of its armory for pursuing individuals for cartel violations despite there apparently being no legal or constitutional impediment to seeking such orders.[53] It has been suggested, for example, that as part of a negotiated plea agreement, prosecutors could "agree to allow individual defendants to reduce or avoid jail time, in return for debarring them from working for any publicly traded corporation or for a company in a particular industry if it is either located in or sells into the United States."[54]

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[51] Hammond, Charting New Waters, *supra* note 2, at 17. *See also* Hammond, Second-In Cooperation, *supra* note 46, at 9 ("Second-in companies that cooperate early in an investigation often have the advantage of being able to offer new and significant evidence through multiple employees. When this is the case, the Division will typically carve out only the highest-level culpable individuals as well as any employees who refuse to cooperate; mid- to lower-level employees who provide significant evidence furthering the investigation will be offered non-prosecution protection under the corporate plea agreement.").

[52] Fines are also imposed on individual cartel defendants, but only on a small proportion of such defendants and in relatively small amounts. See the figures cited in Connor, *supra* note 3, at 110.

[53] Ginsburg & Wright, *supra* note 16, at 38–39.

[54] *Id.* at 39.

The U.S. Sentencing Guidelines authorize the imposition of a condition of probation or supervised release prohibiting the defendant from engaging in a specified occupation, business, or profession or limiting the terms on which the defendant may do so.[55]

Banning orders are regularly sought and obtained by the Federal Trade Commission from federal courts, banning individuals from specific activities (typically telemarketing) or requiring that they post a bond before engaging in such activity.[56] In addition, at least since the early 1980s, the U.S. Securities and Exchange Commission routinely has negotiated consent decrees barring a person accused of violating the securities laws from serving as an officer or director of a public company for a specified number of years.[57]

Disqualification orders are available to competition authorities in a range of other jurisdictions, including the United Kingdom, Australia and Sweden.[58] In the United Kingdom, this sanction is yet to be used by the Office of Fair Trading in relation to cartel offenses, despite

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[55] U.S. SENTENCING GUIDELINES MANUAL § 5F1.5(a) (2009). The statutory authorization for such "occupational restrictions" is found in the Comprehensive Crime Control Act, 18 U.S.C. § 3563(b)(5), § 3583(d) (1984). A sentence involving supervised release is available for antitrust offenses. *See* U.S. SENTENCING GUIDELINES MANUAL § 5B1.1(d) (2009); *see also* para. 3 of the accompanying commentary.

[56] Calkins, *supra* note 32, at 133–34.

[57] Ginsburg & Wright, *supra* note 16, at 38. The SEC has had express statutory authority for seeking such orders since 1990.

[58] There may be other jurisdictions in which disqualification flows from general company law for directors convicted of an offense. For example, section 160 of the Irish Companies Act 1990 (Act No. 33/1990) (Ir.) provides for the automatic disqualification of a company director for a period of five years on conviction on indictment for an offense in relation to a company or an offense involving fraud or dishonesty. This provision has been applied by the courts where directors have been convicted of competition law offenses, as noted in Int'l Competition Network, Trends and Developments in Cartel Enforcement, Presentation at 9th Annual Conference 59 (Apr. 29, 2010). There have been calls for the use of disqualification orders in Europe at the Community level. *See, e.g.*, Mark Powell & Grant McKelvey, *Director Disqualification as a Complement to EU Antitrust Fines: Towards a More Balanced Sanctions Policy*, CPI ANTITRUST J., Dec. 2010, at 1.

clear signals of its intent to do so.[59] In Australia, such orders have been available since January 2007,[60] although there is yet to be a case in which they have been applied. In 2008, the Swedish Competition Authority obtained the power to petition for what is called a "trading prohibition," barring an individual who has participated in a cartel from managing any business for a specified time.[61] It is not known whether or not the power has been used in a cartel case.

The traditional rationale for banning or disqualification orders is protective.[62] The known levels of recidivism among antitrust defendants (even in the United States)[63] suggest that there is a good case for the use of disqualification orders to protect the market, competitors, and consumers from repeat antitrust offenders. However, such orders also have deterrent and punitive effects.[64] In considering the applica-

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[59] *See* Michael Peel, *Business Urged Not to Resist Crackdown on Price Fixing*, FIN. TIMES, June 23, 2008; Office of Fair Trading, Competition Disqualification Orders: Proposed Changes to the O.F.T.'s Guidance (Consultation Paper, OFT1111con, Aug. 2009).

[60] *See* Trade Practices Act, 1974, § 86E (Cth.).

[61] Competition Act (2008:579) (Swed.) ch. 3, art. 4; Trading Prohibition Act (1986:436) (Swed.) art. 8b. *See also* SWEDISH COMPETITION AUTHORITY, THE GENERAL GUIDELINES OF THE SWEDISH COMPETITION AUTHORITY ON TRADING PROHIBITION IN THE EVENT OF INFRINGEMENTS OF THE RULES ON COMPETITION (KKVFS 2010:1, Mar. 17, 2010).

[62] This is reflected in the U.S. Sentencing Guidelines, which authorize the imposition of occupational restrictions only if the court determines that "imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted." *See* U.S. SENTENCING GUIDELINES MANUAL § 5F1.5(a)(2) (2009). The commentary to the Guidelines further states that the condition "should only be used as reasonably necessary to protect the public. It should not be used as a means of punishing the convicted person," citing S. REP. NO. 98-225, REPORT ON THE COMPREHENSIVE CRIME CONTROL ACT (1983).

[63] *See* John M. Connor & C. Gustav Helmers, *Statistics on Modern Private International Cartels, 1990–2005* (Am. Antitrust Inst. Working Paper No. 07-01, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103610 (reporting figures on recidivism).

[64] As recognized, for example, in TRADE PRACTICES ACT REVIEW COMMITTEE, REVIEW OF THE TRADE PRACTICES ACT 1974 (CTH) 161, [10.2.2] (Jan. 2003);

tion of such orders for antitrust offenders, it is necessary therefore to consider the impact on other sanctions in the sentencing mix. Disqualification from corporate management for a substantial period of time, when combined with a fine and a jail sentence, for example, could represent excessive punishment or overdeterrence. It could also have negative side effects on the industry and the market.

In addition, the prospects of evasion of a disqualification or banning order require attention. Disqualification from managing a corporation, for example, may not prevent a defendant from acting as an independent advisor or consultant or from continuing to exert influence over corporate policy and decisions from the position of shareholder. Evasive tactics of this kind can be anticipated to some extent by the formulation of the triggers for breach of the order as broadly as possible.[65]

V. INDIVIDUAL ACCOUNTABILITY THROUGH CORPORATE SANCTIONS

Corporate criminal liability and corporate sanctions are imposed for cartel conduct in the United States partly because of the limited extent to which it is possible to impose individual criminal liability.[66] One purpose of corporate sanctions is to help induce corporations to impose individual accountability as a matter of internal control.[67]

Internal discipline is a factor taken into account by the DOJ when deciding whether or not to prosecute corporations:

> Among the factors prosecutors should consider and weigh are whether the corporation appropriately disciplined wrongdoers, once those employees are identified by the corporation as culpable for the misconduct. Employee discipline is a difficult task for many corporations because of the human element involved and sometimes because of the

Rich v. Austr. Sec. & Invs. Comm'n (2004) 220 C.L.R. 129, 148; OFFICE OF FAIR TRADING, THE DETERRENT EFFECT OF COMPETITION ENFORCEMENT BY THE OFT: DISCUSSION PAPER §§ 1.23, 5.117 (No. OFT 963, Nov. 2007).

[65] *See, e.g.*, Corporations Act, 2001, § 206A(1) (Cth.).

[66] *See* BEATON-WELLS & FISSE, *supra* note 9, § 7.2.3.

[67] RICHARD A. POSNER, ANTITRUST LAW 271 (2d ed. 2001). On the management of post-offense inquiries and responses, see RICHARD S. GRUNER, CORPORATE CRIMINAL LIABILITY AND PREVENTION ch. 16 (2008).

> seniority of the employees concerned. While corporations need to be fair to their employees, they must also be unequivocally committed, at all levels of the corporation, to the highest standards of legal and ethical behavior. Effective internal discipline can be a powerful deterrent against improper behavior by a corporation's employees. In evaluating a corporation's response to wrongdoing, prosecutors may evaluate the willingness of the corporation to discipline culpable employees of all ranks and the adequacy of the discipline imposed. The prosecutor should be satisfied that the corporation's focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers.[68]

Internal discipline is also important in the context of corporate sanctions in cases where, as outlined below, it is not possible or feasible to prosecute individuals for cartel conduct.

Price fixing and market sharing activities often involve numerous individuals and multiple events and transactions.[69] While the DOJ often targets individuals for criminal prosecution, the number proceeded against is limited (see section III above). There may be several reasons for this.

First, it is easier said than done to pinpoint which individuals within corporations should be held accountable.[70] This is not merely a function of size. It is also a reflection of the fact that organizations have "a well-developed capacity for obscuring internal accountability if confronted by outsiders."[71] Thus, in the trial of Arthur Andersen LLP in 2002 for obstruction of justice, defense counsel exploited the difficulty of identifying who had acted with a corrupt intention.[72] The

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[68] U.S. DOJ, *supra* note 34. The Sentencing Guidelines make internal disciplinary action a relevant factor for assessing whether an organization has an effective compliance and ethics program. *See* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(6) (2009).

[69] See, for example, the cases discussed in JOHN M. CONNOR, GLOBAL PRICE FIXING chs. 5, 8 & 11 (2d ed. 2007).

[70] OECD, CARTELS: SANCTIONS AGAINST INDIVIDUALS 100 (DAF/COMP (2004)39, 2004); GRUNER, *supra* note 67, § 1.07.

[71] FISSE & BRAITHWAITE, *supra* note 1, at 38.

[72] *See* Stacey Neumann Vu, *Corporate Criminal Liability: Corporate Verdicts and the Problem of Locating a Guilty Agent*, 104 COLUM. L. REV. 459, 462 (2004).

jury responded by asking the trial judge for direction on this question: "If each of us believes that one Andersen agent acted knowingly and with corrupt intent, is it [necessary] for all of us to believe it was the same agent? Can one believe it was Agent A, another believe it was Agent B, and another believe it was Agent C?"[73] In a situation of that kind, it is impossible to prove individual criminal liability beyond a reasonable doubt. However, corporate criminal liability can be established if it can be proven that one or other of the employees or agents acted with the state of mind required for the offense charged.

Second, the individuals responsible for an offense in the past may not necessarily be in a position to take steps to prevent a similar offense from occurring in the future.[74] Deterrence of unlawful behavior by organizations depends "not merely upon threat-induced abstinence from illegality but upon threat-induced catalysis of preventive controls."[75]

Third, multinational corporate operations can impede attempts to bring individual offenders to justice: an officer of a multinational company may authorize or instigate a cartel offense without setting foot in the United States or, after committing a cartel offense in the United States on behalf of a corporation, may be transferred overseas to a related corporation.[76] In many situations, extradition may be pos-

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[73] *Id.* (the trial judge ruled that a finding of guilt could be made in the situation put by the jury; the ruling was not challenged because the jury found that one employee had acted with a corrupt intent).

[74] FISSE & BRAITHWAITE, *supra* note 1, at 40 ("They may be moved elsewhere by the organization (perhaps to some corporate Siberia, such as secondment to a university) or deprived of the power or status necessary to mount a preventive campaign.").

[75] *Id.*

[76] *Id.* at 40–41. One example is the position of the senior executives primarily responsible for Qantas's involvement in air cargo price fixing. The meager yield of the DOJ enforcement action against individuals was limited to one U.S. Qantas executive (Mr. Bruce McCaffrey). *See Ex-Qantas Freight Chief Pays Heavy Price for Cartel*, SYDNEY MORNING HERALD, May 4, 2009, at 24. Senior Qantas executives in Australia were not subject to extradition to the United States because at that time there was no cartel offense in Australia; cartel offenses came into effect on July 24, 2009.

sible but only with attendant delay, cost, and additional enforcement effort.[77] Corporate criminal liability provides a convenient alternative, one aim being to exert pressure on the local corporation to take steps within the corporate group to stimulate individual accountability.[78]

Situations arise where some or even all of the individuals who were implicated in cartel conduct cannot be held to account internally because they are no longer employed by the corporation or engaged in any other capacity. Nonetheless, the prospect of using private justice systems as an additional avenue for achieving individual accountability will often be open. However, as discussed in sections V.A and V.B below, the mechanisms now available in the United States for using corporate sanctions to achieve individual accountability have significant limitations.

A. Limitations of corporate fines as a means of achieving individual accountability

The fine is the predominant type of sanction used against corporations. The DOJ has secured sizeable fines against corporate cartel offenders, especially over the past fifteen years.[79]

Fines against corporations serve to bring about individual accountability in two main ways. First, a fine is intended to trigger internal disciplinary action against the managers and other employees accountable for the conduct that lead to the fine.[80] Second, the taking of internal disciplinary action is a factor to be taken into account when determining the amount of a fine; under 18 U.S.C. § 3572(a)(8) a court must consider "any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense."[81] However, these mechanisms may or may not work.

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[77] *See, e.g.*, Julian Joshua, *A Long-Distance Runner: Ian Norris's Protracted Fight against Extradition Continues Unabated*, COMPETITION L. INSIGHT, June 30, 2009, at 14.

[78] *See* Sigmund Timberg, *The Corporation as a Technique of International Administration*, 19 U. CHI. L. REV. 739 (1952).

[79] Hammond, Evolution, *supra* note 2, at 5–6.

[80] POSNER, *supra* note 67, at 271.

[81] *See also* GRUNER, *supra* note 67, § 11.02(11)(i).

Fines, or the incentive of a reduced fine, do not ensure that internal disciplinary action is taken against the individuals who participated in or contributed to the cartel conduct for which the fines are imposed.[82] The cheapest and least embarrassing response may be simply to write a check in payment of the fine and continue with business as usual.[83] Corporations have incentives not to undertake extensive disciplinary action. In particular, a disciplinary program may be disruptive, embarrassing for those exercising managerial control, encouraging for whistleblowers, or hazardous in civil litigation against the corporation or its officers.

The U.S. heavy electrical equipment price fixing conspiracies of 1959–61[84] illustrate how internal discipline may or may not flow from corporate liability. Two of the main corporate participants in the conspiracies were General Electric Co. and Westinghouse Corp. Both were convicted and fined. The internal disciplinary reaction of General Electric was severe. All persons implicated in violations of corporate antitrust policy were disciplined by substantial demotion long before any of them were convicted. Those who were later convicted were asked to resign because "the Board of Directors determined that the damaging and relentless publicity attendant on their sentencing rendered it both in their interest and the company's that they pursue their careers elsewhere."[85] By contrast, Westinghouse decided against disciplinary action, partly on the basis of a watered-down version of the defense that failed at Nuremberg: "[A]nybody involved was acting not for personal gain, but in what he thought was the best interests of the company."[86]

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[82] FISSE & BRAITHWAITE, *supra* note 1, at 8–12; John Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanction*, 17 AM. CRIM. L. REV. 419, 458–61 (1980).

[83] *See* Dan Levine, *Antitrust Convictions Don't Mean End of Job for Some Executives*, THE RECORDER, Apr. 12, 2010.

[84] *See* CLARENCE C. WALTON & FREDERICK W. CLEVELAND, CORPORATIONS ON TRIAL: THE ELECTRIC CASES 103 (1964); JOHN HERLING, THE GREAT PRICE CONSPIRACY 311 (1962).

[85] *Administered Prices, Pts. 27 and 28: Hearings before the Subcommittee on Antitrust and Monopoly of the S. Comm. on the Judiciary*, 87th Cong. 17671–72 (1961).

[86] FISSE & BRAITHWAITE, *supra* note 1, at 192.

It might possibly be contended that things have since changed as a result of higher corporate fines and the explicit requirement under 18 U.S.C. § 3572(a)(8) that consideration be given to the factor of internal disciplinary action. However, that seems unlikely and, to be persuasive, any such claim would need to be supported empirically. Case studies of corporations subjected to heavy fines could be instructive in this respect. Insights might also emerge from a comprehensive review of the reasons given for sentences in corporate cases to examine the extent to which 18 U.S.C. § 3572(a)(8) has been relevant in practice and, when it has been relevant, the extent to which fines have been reduced as a result.[87]

Some would contend that "optimal" fines are sufficient to achieve deterrence because they give a strong financial incentive to comply with the law and that, if such an incentive is given, it is immaterial whether or not corporate offenders happen to respond to a fine by taking internal disciplinary action.[88] However, such a contention is unpersuasive. The U.S. Code provisions relating to fines explicitly require that consideration be given to the factor of internal discipline when assessing a fine.[89] Furthermore, in terms of policy, there are several fundamental responses to the contention that "optimal" fines are sufficient to achieve deterrence.

First, it is cavalier to rely on financial incentives in lieu of individual accountability as a mode of social control. Individual accountability is highly valued as a mode of social control largely because experience has demonstrated that it is likely to be more effective than merely offering incentives.[90] Individual accountability does not work merely by asking someone to make a rational choice to avoid financial loss but confronts the particular wrongdoer with his or her wrongdoing and impresses upon the wrongdoer that such conduct is wrong

[87] One starting point is the statement in Gruner, *supra* note 67, § 11.02[11](i): "Clearly, extensive discipline and reforms following an offense will justify a corporate fine in the lower portion of a recommended fine range."

[88] *See, e.g.*, Elzinga & Breit, *supra* note 20, ch. 7.

[89] 18 U.S.C. § 3572(a)(8) (2010).

[90] Fisse & Braithwaite, *supra* note 1, ch. 3.

and not tolerated within the social group in which accountability is upheld. As Stucke has illuminated, managers and employees may not be rational actors but may often engage in cartel conduct as a result of behavioral or situational factors that include unclear standards and pressure to perform.[91] Trying to counter the influence of such factors by means of financial disincentives alone is unlikely to succeed. Compliance is more likely to occur if individual accountability is embedded and upheld as a core value in the working environment. That is reflected by the relevance of individual accountability under the Sentencing Guidelines provisions on an effective compliance and ethics program[92] and generally in antitrust compliance programs.

Second, it is impossible to make the calculations required to assess "optimal" fines against corporations. Assessments of the risk of conviction and the likely amount of gain from wrongdoing require data and reliable data is generally not available.[93] By contrast, imposing individual accountability is a tried and trusted means of social control that does not require calculation of the risk of conviction or the likely amount of gain from an offense. This feature of individual accountability has been explained by Fisse and Braithwaite:

> A more fundamental way of managing the uncertainty surrounding the impact of sanctions against corporations and their personnel is apparent in the importance traditionally attached to the concept of responsibility. . . . The emphasis placed on responsibility reflects a "rules of action" approach that has been adopted to avoid the need to make difficult and unreliable probabilistic calculations about the effects of financial incentives.
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> Two rules of action are involved. First, we should disapprove of certain types of actions (such as crimes) by recognising them as wrong. Second, we should hold responsible those who are blameworthy as wrongdoers. In legal as well as everyday decision making, these rules of action may be more workable than case-by-case calculation of the uncertain range of costs and benefits that may attach to any given act. Simple rules of action have lower information and transaction costs, especially in domains where uncertainty or inestimability of benefit–cost are so great as fre-

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[91] Stucke, *supra* note 3.

[92] U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(6) (2009).

[93] John Byrne & Steven M. Hoffman, *Efficient Corporate Harm: A Chicago Metaphysic*, *in* CORRIGIBLE CORPORATIONS AND UNRULY LAW 101 (Brent Fisse & Peter A. French eds., 1985).

> quently to cause major estimation errors. Simple rule-following may even result in better average returns in terms of benefit–cost. A little knowledge of benefit–cost under conditions of great uncertainty is a dangerous thing. We might well make better judgements by assuming that any knowledge we have is likely to be misleading if we accept it in isolation from all the other knowledge we lack. Put another way, we seek an alternative decision making approach which is more forgiving of uncertainty about what we know. Further, we might take the view that courts are institutions that are well equipped to follow rules of action about assessing responsibility. But we might also consider them poorly equipped to measure the financial benefits and costs of particular decisions made by others, or indeed by themselves.[94]

The upshot is that corporate fines are not geared to delivering individual accountability. If individual accountability is to be delivered effectively by means of a corporate sanction, the sanction needs to be designed specifically to achieve that outcome. This brings us to the possible use of corporate probation as a vehicle for requiring internal disciplinary action.

B. Corporate probation as a means of achieving individual accountability

It is possible under 18 U.S.C. §3563(b)(22) for internal disciplinary action to be made a condition of corporate probation.[95] This possibility was envisaged by Coffee in 1981.[96] He took as his starting point the Gulf Oil Corporation report on bribery committed in the United States and abroad by its personnel during the 1970s and earlier. The report was prepared by an outside counsel, John J. McCloy. The revelations in the McCloy study were sufficiently interesting to be picked up by the press and for the report to be republished as a paperback best-seller.[97] It brought about substantial internal reforms at Gulf and hastened the

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[94] FISSE & BRAITHWAITE, *supra* note 1, at 92.

[95] For a review of corporate probation, see AMERICAN BAR ASSOCIATION, CRIMINAL ANTITRUST LITIGATION HANDBOOK 473–75 (2d ed. 2006).

[96] John C. Coffee Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 430–32 (1981).

[97] JOHN J. MCCLOY, NATHAN W. PEARSON & BEVERLEY MATTHEWS, THE GREAT OIL SPILL: THE INSIDE REPORT, GULF OIL'S BRIBERY AND POLITICAL CHICANERY (1976).

resignation of some senior officials named in it. Coffee was thus prompted to ask whether McCloy-style reports should become a routine part of corporate crime enforcement. One mechanism favored by Coffee was placing corporate defendants on probation, subject to a condition that they employ outside counsel to prepare a report that names key participants and outlines in readable form their modus operandi.

There appear to be various reasons why this possible use of corporate probation has not been influential in the United States, in antitrust cases or elsewhere. Deferred prosecution agreements, a form of corporate probation, have been used by the DOJ in some contexts as a means of leveraging internal disciplinary action[98] but not in cartel cases.[99]

First, internal disciplinary conditions of probation are not authorized explicitly in either the U.S. Code provisions on probation or the U.S. Sentencing Guidelines relating to organizational defendants. The Sentencing Guidelines focus on compliance programs rather than addressing the fundamental issue of individual accountability.[100]

Second, the provisions relating to probation in the U.S. Code and the Sentencing Guidelines do not set out a statutory scheme of the kind needed to make the approach work in practice. The traditional model of probation is a far cry from a sanction dedicated to achieving internal accountability within a corporation.[101] This is evident from the detailed Accountability Model proposed by Fisse and Braithwaite for

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[98] *See, e.g.*, Sue Reisinger, *Bristol-Myers Takes Its Medicine*, CORP. COUNSEL, Sept. 20, 2007; Press Release, Dep't of Justice, UBS Enters into Deferred Prosecution Agreement (Feb. 18, 2009), *available at* http://www.usdoj.gov/opalpr/2009/February/09-tax-136.html. Deferred prosecution agreements have been the subject of some criticism. *See, e.g.*, Peter Spivack & Sujit Raman, *Regulating the "New Regulators": Current Trends in Deferred Prosecution Agreements*, 45 AM. L. REV. 159 (2008).

[99] The assumption appears to be that it is sufficient to prosecute individuals who come to light as a result of leniency applications. Such an assumption is questionable because it takes insufficient account of cases in which individuals implicated in cartel conduct cannot be identified or prosecuted.

[100] *See* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(6) (2009).

[101] This is not to deny that the Sentencing Guidelines make a number of useful adaptations for dealing with organizational defendants. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 8 (2009).

achieving individual accountability for corporate crime.[102] That model is designed on the basis of twenty desiderata geared to practical implementation of the principle that all who are responsible should be held responsible. One desideratum is that a strategy for allocating individual responsibility should remedy the scapegoating that has been endemic when individual accountability for corporate wrongdoing has been pursued.[103] Another is that a strategy for sanctioning the responsible should minimize spillovers of the effects of sanctions onto actors who bear no responsibility for the wrongdoing.[104] These and other desiderata are important but are not reflected in the U.S. Code provisions on corporate probation or in the Sentencing Guidelines.

Third, concern has been expressed about the risk of excessive intervention by the courts in the internal affairs of corporations.[105] That concern is unlikely to be dispelled unless a clearly defined and suitably delimited model of enforced self-regulation is articulated.[106]

Fourth, it is often claimed that courts and prosecutors lack the experience or skills required to supervise corporate internal con-

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[102] FISSE & BRAITHWAITE, *supra* note 1, at chs. 5–6. A similar approach has been adopted by the Canadian Bureau of Competition, as reflected in its Prohibition Order in *The Queen v. Cascades Fine Papers Group Inc.* ¶ 3(a)(iii) (Court of Ontario, Superior Court of Justice, Jan. 9, 2006), *available at* http://www.competitionbureau.gc.ca/eic/site/cbbc.nsf/vwapj/Prohibition%20Order.pdf/$file/Prohibition%20Order.pdf. The Australian Law Reform Commission has recommended the introduction of internal discipline orders as a sentence against corporations convicted of an offence under Commonwealth law. AUSTRALIAN LAW REFORM COMMISSION, SAME CRIME, SAME TIME: SENTENCING OF FEDERAL OFFENDERS §§ 30.14-30.16 (Report No. 103, 2006). However, that recommendation is yet to be adopted by the Australian government.

[103] FISSE & BRAITHWAITE, *supra* note 1, at 136 (desideratum 7 discussed at 38–41, 55–57, 96–97, 129).

[104] FISSE & BRAITHWAITE, *supra* note 1, at 136 (desideratum 8 discussed at 49–50, 64).

[105] *See, e.g.*, Christopher A. Wray, *Corporate Probation under the New Organizational Sentencing Guidelines*, 101 YALE L.J. 2017, 2035–37 (1992).

[106] FISSE & BRAITHWAITE, *supra* note 1, at 88, 130, 197–98. On enforced self-regulation, see John Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, 80 MICH. L. REV. 1466 (1982).

trols.[107] Although this claim is questionable, it has the force of being a political mantra.

Fifth, insistence on internal disciplinary action is a severe type of sanction whereas probation tends to be perceived as a "soft" option notwithstanding its formally punitive character in the United States. This partly explains the proposal made elsewhere that punitive injunctions be introduced as a sanction against corporations.[108] The punitive injunction is a punitive variant of the mandatory civil injunction or corporate probationary order. It is intended to serve as a sanction against corporations for serious offenses without going to the extremes of disqualification from conducting business or dissolution. The punitive element requires a corporate offender to act in a demanding way that may go beyond the limits of remedial action. The demanding response required is nonfinancial in terms of its direct impact within a corporation. The punitive effect sought is a positive regulatory outcome. The main kinds of positive regulatory outcomes sought in the context of cartel conduct are: (1) the imposition of internal accountability for the cartel offense; (2) the revision of organizational precautions against future possible cartel offenses or contraventions; and (3) the facilitation of civil redress to the victims of a cartel offense or contravention.

Sixth, using probation as a means of achieving internal accountability would require additional administration by courts and prosecutors. The contrast is with fines, which are relatively easy to impose.[109]

Seventh, plea bargaining and corporate plea agreements have a propensity to result in individuals' being shielded from enforcement action. This danger has been highlighted by Gruner:

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[107] *See e.g.*, Levine, *supra* note 83 (quoting Gary Spratling, former Deputy Assistant Attorney General, U.S. Department of Justice, as saying: "Prosecutors may be good at investigating crimes, but they haven't gone to business school and are not corporate governance experts").

[108] *See* Brent Fisse, *Cartel Offences and Non-Monetary Punishment—The Punitive Injunction as a Sanction against Corporations*, *in* CRIMINALISING CARTELS, *supra* note 3, at ch. 14.

[109] Administration after sentence seems to be limited to ensuring that a fine or fine installments are paid and dealing with cases in which a defendant becomes insolvent before a fine or an installment of a fine is paid.

> Mandated offense studies and disclosures are particularly important means to counteract "an unfortunate plea bargaining dynamic" that tends to conceal the substance of corporate offenses. Often, when a firm and its top corporate officials are both prosecuted, the firm will agree to plead guilty in exchange for an agreement by prosecutors to drop charges against the individual officers. The corporation's plea may reveal little about the circumstances of its offense or about the identity of those persons within the corporate organization who were responsible for the offense.[110]

Gruner expressed the view that sentencing courts could use probation sentences as a vehicle for ensuring that the plea bargaining process does not block out public understanding of the culpability of individuals who are responsible for corporate offenses.[111]

In the context of cartel conduct, plea agreements often carve out named individuals but, as observed in section III of this article, the carve-outs appear highly selective and do not expose the nature and extent of implication of other managers and employees. This approach gives the DOJ a bargaining chip that seems to be valued in plea agreement negotiations.

Finally, the conduct resulting in the commission of an offense in the United States by a local U.S. corporation may have stemmed from instructions by the management of an overseas affiliated corporation.[112] In such a case the overseas affiliate may be subject to jurisdiction in the United States and prosecuted.[113] However, where the local

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[110] GRUNER, *supra* note 67, § 12.03[3]. *See also* John C. Coffee, Richard S. Gruner & Christopher D. Stone, *Standards for Organizational Probation: A Proposal to the United States Sentencing Commission*, 10 WHITTIER L. REV. 77, 85 (1988).

[111] GRUNER, *supra* note 67, § 12.03[3] ("Sentencing courts can avoid this result by accepting corporate plea bargains, but ensuring through probation sentences that the circumstances of an offense are thoroughly investigated and revealed.").

[112] One example is Qantas's implication in air cargo price fixing. *See* Sentencing Memorandum, United States v. McCaffery, No. 1:08-cr-00135 JDB (D.D.C. 2008). The role of senior Qantas executives based in Australia is canvassed in ACCC v. Qantas Airways Ltd., NSD 1694 2008 Federal Court of Australia, Joint Submission, Statements of Agreed Facts and Admissions pursuant to § 191 of the Evidence Act 1995.

[113] *See, e.g.*, United States v. Nippon Paper Indus. Co. (*Nippon II*), 109 F.3d 1, 4 (1st Cir. 1997).

corporation is prosecuted but the overseas affiliate is not, a U.S. court will not have the power to require the overseas affiliate to take internal disciplinary action.

A modest proposal would be to put some focus on individual accountability in plea agreements, as by reserving the right to seek internal disciplinary action as a condition of probation unless the corporate defendant has filed with the DOJ an internal disciplinary report that is acceptable to the DOJ. The present plea agreement process is less than satisfactory in this regard. First, as previously observed, not all plea agreements are available on the DOJ Web site, one example being the plea agreement in the case of LG Display Co. and LG Display America, Inc.,[114] in which a fine of $400 million was agreed to. Second, plea agreements often do not say anything about the application of 18 U.S.C. § 3572(a)(8) (requiring a court to consider "any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense").[115] Third, if a plea agreement recites that probation will not be recommended to the court by reason of the defendant's "substantial assistance"[116] or "improvements to its compliance program,"[117] it is unclear whether or not the defendant has undertaken internal disciplinary action or, if it has, what that action has been.

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[114] Plea Agreement, United States v. LG Display Co. Ltd, No. CR-08-0803 VRW (N.D. Cal. 2008) (plea agreement unavailable to the public on the PACER database).

[115] 18 U.S.C. § 3572(a)(8) is not mentioned in any of the sixteen plea agreements available on the DOJ Web site for 2009 and 2010. *See* U.S. DOJ, Antitrust Division, Sherman Act Violations Yielding a Corporate Fine of $10 Million or More (2010), *available at* http://www.justice.gov/atr/public /criminal/sherman10.pdf.

[116] *See, e.g.*, Plea Agreement at 7, United States v. Japan Airlines Int'l Co., No. 08-00106 JBD (D.D.C. May 7, 2008); Plea Agreement at 8, United States v. Qantas Airways Ltd., No. 07-00322 JDB (D.D.C. Jan. 14, 2008).

[117] *See* Plea Agreement at 9, United States v. SAS Cargo Group, No. 08-cr-00182 JDB (D.D.C Jul. 21, 2008).

VI. CONCLUSION

The extent of individual accountability for cartel conduct in the United States, as elsewhere, may be more limited than some might have one believe. The chances are that individuals responsible for cartel offenses will not be prosecuted and that corporate fines will not result in internal disciplinary action being taken against them. Yet few would disagree with the principle that all who are responsible for serious cartel conduct should be held accountable.

Finding workable ways of imposing individual accountability on the large number of individuals typically implicated in cartel conduct remains a formidable challenge around the world. Headway will be made on this issue, not by imagining that the United States has solved the problem, but by coming more fully to grips with it.

The next step that needs to be taken is to conduct an empirical inquiry into the issues raised by the discussion above. That inquiry would require a comprehensive review of DOJ and court records, interviews with DOJ prosecutors, surveys of and interviews with previously prosecuted companies, interviews with previously prosecuted individuals, interviews with corporations that have been fined pursuant to plea agreements, and interviews with judges and the U.S. Sentencing Commission.[118]

The main questions that require investigation are:

- the approximate number of individuals who would have been liable but were not prosecuted by virtue of having obtained automatic derivative immunity under a corporate leniency agreement;
- the approximate number of individuals who would have been liable but were not prosecuted in accordance with a term negotiated as a part of a corporate plea agreement;
- the number of individuals carved out from corporate leniency agreements and the reasons why they were carved out;

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[118] Empirical studies of actual impacts are all too rare. *See, e.g.*, ANDREW HOPKINS, THE IMPACT OF PROSECUTIONS UNDER THE TRADE PRACTICES ACT (1978); Lewis D. Solomon & Nancy Stein Kowak, *Managerial Restructuring: Prospects for a New Regulatory Tool*, 56 NOTRE DAME L. REV. 120 (1980); BRENT FISSE & JOHN BRAITHWAITE, THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS (1983).

- the extent to which corporations would be disincentivized from applying for corporate leniency if derivative leniency for individual employees was more limited or if the proportion of carve-outs was greater;
- relatedly, the extent to which reduced derivative leniency and increased carve-outs would generate greater use of the individual leniency policy;
- the extent to which corporations would be disincentivized from applying for corporate leniency if internal disciplinary action was made a condition of leniency;
- the extent to which corporations voluntarily take internal disciplinary action against individuals involved in cartel conduct for which the corporation (and/or the individuals) have been convicted;
- the extent to which internal disciplinary action is made a condition of corporate plea agreements;
- the extent to which judges request information about carve-outs or internal disciplinary action in deciding whether or not to accept a corporate plea agreement;
- the extent to which deferred prosecution agreements have been considered for use in the context of anticartel enforcement and the justification for adopting a different approach.

To conclude, further empirical investigation is required in order to test fully the extent to which the DOJ's approach to anticartel enforcement achieves individual accountability. Such an investigation is warranted with regard to the influence of the U.S. model around the world and the strength of advocacy by the U.S. authorities as to its merits.