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The Yates Memorandum and Cartel Enforcement

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The Supreme Court has observed that cartels — many of which are international in scope — are "the supreme evil of antitrust."[1] The Department of Justice ("DOJ") appears to agree. The Sherman

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[1] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004) ("[C]ompelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion.").

Antitrust Act[2] criminalizes anticompetitive cartel behavior, the DOJ's Antitrust Division ("Division") has described anti-cartel enforcement as its top priority,[3] and since the mid-1990s, almost half of criminal antitrust violations targeted by the Division have involved international cartels.[4] Such cartels are common. During the period of 2010 to 2016, an average of seventy-five international cartels per year were detected,[5] and the detection rates for both United States and European cartels have been widely estimated at less than twenty percent.[6]

In September 2015, then-DOJ Deputy Attorney General Sally Yates issued a document entitled "Individual Accountability for Corporate Wrongdoing,"[7] commonly referred to as the Yates Memorandum, that was designed to reaffirm the DOJ's commitment to hold executives and other individuals accountable for corporate misconduct.[8] Yates likely issued the memorandum in response to widespread criticism that, following the Great Recession of 2007–2009, the DOJ pursued enforcement actions against financial institutions without a successful prosecution of any senior officers employed by those organizations.[9] The Yates Memorandum will likely impact the DOJ's approach to anti-cartel enforcement in multiple ways. This Article examines that impact and concludes that the Yates Memorandum will likely enhance the DOJ's ability to aggressively pursue such enforcement, subject to some caveats.

[2] 15 U.S.C. §§ 1-7 (2018).

[3] *See* Belinda A. Barnett, Senior Counsel to the Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Criminalization of Cartel Conduct — the Changing Landscape (Apr. 3, 2009), https://www.justice.gov/atr/criminalization-cartel-conduct-changing-landscape.

[4] D. Daniel Sokol, *Policing the Firm*, 89 NOTRE DAME L. REV. 785, 806 (2013).

[5] John M. Connor, *International Cartel Stats: A Look at the Last 26 Years*, LAW360 (Aug. 12, 2016, 1:06 PM), https://www.law360.com/articles/827868/international-cartel-stats-a-look-at-the-last-26-years.

[6] *See* Sokol, *supra* note 4, at 791-92.

[7] Sally Q. Yates, *Memorandum*, *Individual Accountability for Corporate Wrongdoing*, U.S. DEP'T JUST. (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download.

[8] *See* Robert R. Stauffer & William C. Pericak, *Twenty Questions Raised by the Justice Department's Yates Memorandum*, 99 Crim. L. Rep. (BNA) 191 (May 2016) (stating that the Yates Memorandum likely is a "response to criticism of significant investigations that resulted in high-profile settlements with corporations but relatively few prosecutions of top-level employees . . . .").

[9] *See* Gideon Mark, *The Yates Memorandum*, 51 UC DAVIS L. REV. 1589, 1591-92 (2018).

I. THE DOJ'S HISTORICAL APPROACH TO CARTEL ENFORCEMENT

In order to predict the impact of the Yates Memorandum, it is necessary to first examine the Antitrust Division's historical approach to cartel enforcement. While the United States has treated cartel activity as a crime for more than a century, it did not aggressively pursue individuals until the last two decades. Beginning in the 1990s, the Division began adopting policies and developing enforcement techniques based on the proposition that individual accountability is the most effective way to deter cartel conduct[10] — a first aspect of the Division's modern approach to cartel enforcement. Part of this approach was to convince other nations to criminalize cartel conduct.

This lobbying effort has been moderately successful. By January 2018, at least thirty-six countries imposed criminal liability for cartel activities, including such major economic powers as Australia, Brazil, Canada, France, Germany, Israel, Japan, Mexico, Russia, South Korea, and the United Kingdom.[11] Notably, the list excludes several of the nations in Western Europe. Further, not all nations that have criminalized cartel conduct for corporations have done so for individuals[12] and not all nations are strict enforcers. For example, since the 1950s, Japanese courts have commuted all prison sentences for cartel crimes to home arrests or community service.[13] While almost all of the jurisdictions that have criminalized cartel conduct have done

[10] Robert E. Bloch et al., *The Yates Memorandum's Impact on U.S. Cartel Enforcement: Evolution or Revolution?*, COMPETITION POL'Y INT'L 2 (June 2016), https://www.competitionpolicyinternational.com/wp-content/uploads/2016/06/BlochKramerMedlock.final_.pdf.

[11] *See* J. Clayton Everett, Jr. et al., *2017 Global Cartel Enforcement Report*, MORGAN LEWIS LLP 14 (Jan. 2018), https://www.morganlewis.com/documents/m/documents/cartel/cartel_report_2017_year_end_180091.pdf (listing thirty-six countries) [hereinafter *2017 Global Cartel Enforcement Report*].

[12] *See* Megan Dixon, *A Tension in the U.S. Approach to International Cartel Enforcement: At What Point Does Aggressive Pursuit of Individuals Undercut the Corporate Leniency Program?*, 8 COMPETITION L. INT'L 1, 1 (Jan. 2012), https://www.hoganlovells.com/~/media/hogan-lovells/pdf/publication/00118ibajournalarticlecorpleniency02ks_pdf ("There is a global trend toward criminalizing cartel activity for corporations, and to a lesser extent for individuals.").

[13] John M. Connor, *The Rise of Anti-Cartel Enforcement in Africa, Asia, and Latin America* 9 (Am. Antitrust Inst., Jan. 8, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2711972.

so since 1995,[14] some countries, such as Indonesia and New Zealand, have rejected criminalization of antitrust offenses since then.[15]

A second aspect of the Antitrust Division's modern approach has been its focus on increased prosecution of individuals who have been carved-out of corporate plea agreements. In sharp contrast to the DOJ's Criminal Division, the Antitrust Division has mostly eschewed the use of deferred prosecution agreements and non-prosecution agreements in favor of plea agreements.[16] From 1990 to 1999, the Division prosecuted roughly even numbers of corporations and individuals; from 2000 to 2009, the Division prosecuted twice as many individuals (453) as corporations (220); and from 2010 to 2017, the Division prosecuted nearly three times as many individuals (431) as corporations (150).[17] Many of these individuals included senior-level executives[18] who were carved-out of corporate plea agreements. For example, the DOJ's dynamic random access memory ("DRAM") and liquid crystal display ("LCD") cartel investigations resulted in the prosecutions of two chairmen/CEOs, four presidents, more than twenty vice presidents, and numerous managers and directors.[19] These prosecutions reflect the fact that cartels are rarely limited to low-level or rogue employees.[20]

[14] Gregory C. Schaffer et al., *Criminalizing Cartels: A Global Trend?* 1-2 (Minnesota Legal Studies, Research Paper No. 11-26, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2288871.

[15] J. Clayton Everett, Jr. et al., *2015 Global Cartel Enforcement Report*, MORGAN LEWIS LLP 1, 4 (Jan. 2016), https://www.morganlewis.com/~/media/files/document/cartel-enforcement-report-year-end-2015.ashx.

[16] *See* David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1301 (2013) (noting that non-prosecution agreements and deferred prosecution agreements are rarely used in the Antitrust Division, even as such agreements "have become almost the norm" in the Criminal Division).

[17] *See Criminal Enforcement Trends Charts*, U.S. DEP'T JUST., https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts (last updated Mar. 12, 2018).

[18] Sokol, *supra* note 4, at 813 ("The majority of individual defendants in cartel cases have been at the level of a company's corporate officers.").

[19] *See* Brent Snyder, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Individual Accountability for Antitrust Crimes, Remarks as Prepared for the Yale School of Management Global Antitrust Enforcement Conference 2-3 (Feb. 19, 2016), https://www.justice.gov/opa/file/826721/download [hereinafter *Individual Accountability*].

[20] Brent Snyder, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Compliance is a Culture, Not Just a Policy, Remarks as Prepared for the International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop 7 (Sept. 9, 2014), https://www.justice.gov/atr/file/517796/download.

Concurrently, prison sentences imposed on carved-out individuals have lengthened, consistent with the Antitrust Division's perspective that a risk of incarceration most effectively deters individuals from exhibiting cartel behavior.[21] This perspective, which is widely shared in the field of white collar crime,[22] likely is correct. Other methods, such as fines and civil penalties, recoup, on average, only ten percent of cartel overcharges,[23] and fines at a level sufficient to deter cartel conduct can exceed the ability of cartel participants to pay while surviving as viable enterprises in the market.[24] These kinds of sanctions may not function as effective deterrents.[25] But the threat of lengthy prison sentences for individuals can both deter cartel conduct and facilitate the detection and prosecution of cartels by incentivizing self-reporting and cooperation,[26] even if it does not significantly modify firm-level decision-making.[27] While there appears to be no empirical evidence demonstrating that longer prison sentences for cartel offenders have a significantly greater deterrent effect,[28] the average sentence in the United States for antitrust violations increased from eight months during the years 1990 to 1999 to twenty months during the years 2010 to 2017.[29]

A third aspect of the Antitrust Division's modern approach to cartel enforcement has been the increased prosecution of foreign executives and a parallel but more limited increase in extraditions. The United States' antitrust laws have a broad extraterritorial reach. Even before the Yates Memorandum, the DOJ led major international cartel

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[21] *See* Snyder, *Individual Accountability*, *supra* note 19, at 3.

[22] *See, e.g.*, Ben Bedell, *Probes of White-Collar Crime to Target Corporate Leaders*, N.Y. L.J. (Sept. 11, 2015, 12:00 AM), https://www.law.com/newyorklawjournal/almID/1202736903664 (quoting prominent federal district judge Jed Rakoff for proposition that "by far the greatest deterrent to white-collar crime is prison time for high-level individuals").

[23] Connor, *supra* note 5.

[24] GREGORY J. WERDEN ET AL., U.S. DEP'T JUST., DETERRENCE AND DETECTION OF CARTELS: USING ALL THE TOOLS AND SANCTIONS 4 (Mar. 1, 2012), https://www.justice.gov/atr/file/518936/download.

[25] Sokol, *supra* note 4, at 796 ("[F]ines seem to be insufficient as a deterrent for cartels."); Connor, *supra* note 5 ("By failing to recoup 100 percent of the financial rewards of illegal conduct, it is clear that antitrust penalties are on average inadequate to deter cartel formation.").

[26] WERDEN ET AL., *supra* note 24, at 7.

[27] *See* Sokol, *supra* note 4, at 796 ("[W]hile jail time may affect an individual's participation in a cartel, it does not seem to significantly alter firm-level decision-making.").

[28] *See* Dixon, *supra* note 12.

[29] *See Criminal Enforcement Trends Charts*, *supra* note 17.

investigations against numerous foreign executives who were prosecuted and sentenced for conduct undertaken abroad. In recent years, the number of indicted foreign executives in antitrust cases has significantly increased.[30] From January 2009 to June 2016, the Antitrust Division prosecuted 417 individuals who were carved-out of corporate plea agreements, and approximately one-third of them were foreign citizens.[31] This trend is explained in large part by the Division's decision to abandon its standard practice of the 1990s, which emphasized prosecuting only the single most culpable employee from each prosecuted foreign company.[32] Since then, the Division has convinced a substantial number of foreign nationals to voluntarily stand trial in the United States or plead guilty to a Sherman Act violation and serve a federal prison term. The collusive activity in the automotive parts industry illustrates this trend. By December 2017, the Division had charged forty-eight companies and sixty-five of their executives in the United States, and the defendants agreed to pay more than $2.9 billion in criminal fines.[33] Dozens of foreign executives, many of them Japanese, negotiated plea agreements that involved serving prison terms in this country.[34] These are not brief sentences. Mean prison sentences for foreign nationals in antitrust cases prosecuted by the DOJ doubled to almost sixteen months from 2000 to 2015.[35]

There are incentives for foreign executives to voluntarily submit to United States jurisdiction. They avoid the risk of an unexpected arrest during foreign travel based on an international arrest warrant, and

[30] *See Assistant Attorney General Bill Baer of the Antitrust Division Testifies before Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights*, U.S. DEP'T JUST. (Mar. 9, 2016), https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-antitrust-division-testifies-senate-judiciary ("In the last 10 years we have increased by more than three times the number of foreign defendants convicted and jailed over the previous 10-year period.").

[31] *See* Bloch et al., *supra* note 10, at 4 ("[S]ince January 20, 2009, the Division has prosecuted 417 individuals. At least 65 percent of these individuals were U.S. citizens.").

[32] *See* Scott D. Hammond, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades 9-10 (Feb. 25, 2010), https://www.justice.gov/atr/file/518241/download.

[33] *See* Everett, Jr. et al., *2017 Global Cartel Enforcement Report*, *supra* note 11, at 24.

[34] *See* Mark L. Krotoski, *Extradition in International Antitrust Enforcement Cases*, ANTITRUST SOURCE 2 n.8 (Apr. 2015), https://www.morganlewis.com/~/media/files/publication/outside%20publication/article/antitrust-source-extradition-in-international-antitrust-enforcement-cases-april2015.ashx ("Of the 46 individuals, 26 have been sentenced to serve time in U.S. prisons.").

[35] Snyder, *Individual Accountability*, *supra* note 19, at 9.

negotiated sentences are typically lower than the sentences that would be imposed following a trial.[36] An unexpected arrest may occur if the Antitrust Division has placed an indicted executive on Interpol's "Red Notice" list, which is a compilation of names of wanted fugitives maintained by Interpol's 190 member nations.[37] A Red Notice requires all Interpol members to arrest a person wanted for prosecution or to serve a previously imposed sentence.[38] It has been characterized by the United States Attorneys' Manual ("USAM") as the "closest instrument to an international arrest warrant in use today."[39] In 2001, the Division adopted a policy of placing indicted executives on the Red Notice list.[40] Since then, when traveling to a jurisdiction that is willing to extradite, individuals have been subject to provisional arrest even if their home country is unwilling. Accordingly, counsel for individuals who are known to be under indictment (or may be under sealed indictment) in cartel cases routinely advise them to avoid international travel.[41] Foreign nationals who accept this advice are essentially captives in their own countries.[42] The Red List hazard has induced a number of foreign cartelists to surrender and serve prison sentences in the United States.[43]

Not all foreign executives recognize the foregoing incentives, and dozens of individuals indicted for cartel violations have been reported as living as fugitives outside the United States.[44] Moreover, in recent

[36] Bloch et al., *supra* note 10, at 5.

[37] *See Member Countries*, INTERPOL, https://www.interpol.int/Member-countries/World (last visited Mar. 5, 2018); *Red Notices*, INTERPOL, https://www.interpol.int/INTERPOL-expertise/Notices/Red-Notices (last visited Mar. 5, 2018).

[38] Jacques Semmelman & Emily Spencer Munson, *Interpol Red Notices and Diffusions: Powerful — and Dangerous — Tools of Global Law Enforcement*, 38 CHAMPION 28, 29 (May 2014), http://www.curtis.com/siteFiles/Publications/Jacques_Semmelman_Interpol_28-42.pdf.

[39] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-15.635 (2015).

[40] Hammond, *supra* note 32, at 14.

[41] Steven F. Cherry et al., *Department of Justice's First Antitrust Extradition Highlights the Danger of Foreign Travel for Executives Under Investigation*, BUS. L. TODAY (Apr. 2014), https://www.americanbar.org/publications/blt/2014/04/keeping_current_cherry.html.

[42] *See* Christopher Thomas & Gianni De Stefano, *Extradition & Antitrust: Cautionary Tales for Global Cartel Compliance*, MLEX AB EXTRA 5 (Sept. 30, 2016), https://www.hoganlovells.com/~/media/hogan-lovells/pdf/publication/hogan_lovells_ab_extra_30_09_16.pdf.

[43] *See* Melissa Lipman, *Exclusive: DOJ's Baer Promises More Extradition Fights*, LAW360 (May 15, 2015, 7:55 PM), https://www.law360.com/articles/656850/exclusive-doj-s-baer-promises-more-extradition-fights (quoting then-DOJ Assistant Attorney General Bill Baer).

[44] Jay L. Himes & Rudi Julius, *"I'm Never Too Far Away": Extradition of Non-U.S.*

years companies have lost leverage in persuading or compelling foreign executives to submit to United States jurisdiction. Since 2014, the Antitrust Division has increasingly focused on corporate compliance programs. As part of this focus, it expects that culpable individuals will be terminated or removed from positions of substantial authority during investigations.[45] If a company complies with this expectation, it will surrender most or all of its leverage to compel a culpable foreign executive to submit to United States jurisdiction and serve a prison sentence in this country.[46]

The cumulative effect is that the Antitrust Division is required to rely on extradition in numerous cases involving international cartels. This reliance is not unique to the Antitrust Division. In cases involving the Foreign Corrupt Practices Act ("FCPA"),[47] the DOJ asserts broad extraterritorial jurisdiction over foreigners living abroad. But these individuals increasingly refuse to submit to United States jurisdiction and instead compel the DOJ's Fraud Section to seek extradition.[48] The Fraud Section rarely succeeds,[49] and thus recent lists of FCPA fugitives remain fairly long. For example, a March 2017 list identified eleven fugitives in FCPA-related cases.[50]

Nationals Charged with Price-Fixing, 28 NYSBA INT'L L. PRACTICUM 121, 122 (2015), https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=43032.

[45] Craig P. Seebald & Brian D. Schnapp, *DOJ's Catch-22: Corporate Criminal Antitrust Targets Walk a Blurry Line with Culpable Employees*, ANTITRUST SOURCE 1, 5-6 (Aug. 2016), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug16_schnapp_8_5f.authcheckdam.pdf.

[46] *See id.* at 7 ("The Antitrust Division's new policies may have the unintended consequence of causing fewer culpable employees residing overseas to serve time in prison, as companies will lack any meaningful leverage to force them to come to the United States.").

[47] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3, 78ff, 78m(b), (d)(1), (g)-(h) (2018)).

[48] *See* Jeremy Evans & Andreas Stargard, *Executives Beware: The Long-Arm of the U.S. Government Strikes Again*, PAUL HASTINGS: STAY CURRENT 1 (Apr. 7, 2014), https://www.paulhastings.com/publications-items/details/?id=2598e069-2334-6428-811c-ff00004cbded ("The Antitrust Division is not alone in its pursuit of foreign nationals; the Fraud Division of the Justice Department has also pursued extradition of foreign nationals for violations of the [FCPA].").

[49] Lauren Briggerman et al., *DOJ is Losing the Battle to Prosecute Foreign Executives*, LAW360 (Mar. 3, 2015, 10:40 AM), https://www.law360.com/articles/626482/doj-is-losing-the-battle-to-prosecute-foreign-executives.

[50] *See* Marc Alain Bohn & Christine Ciambella, *The FCPA Docket (March 2017)*, FCPA BLOG (Mar. 14, 2017, 7:28 AM), http://www.fcpablog.com/blog/2017/3/14/the-fcpa-docket-march-2017.html.

Prior to 2010 the Antitrust Division had never successfully extradited a foreign executive. That record of failure changed in March 2010 with the successful extradition of Ian Norris, the former CEO of Morgan Crucible, PLC, from the United Kingdom to the United States. Norris had been indicted on four counts, including conspiracy to price-fix and obstruction of justice, for masterminding a global cartel in carbon products. Following his extradition, however, he was convicted only on the obstruction count.[51] Less than two years later, the Division secured the extradition from Israel of David Porath on hospital bid-rigging and tax fraud charges.[52] Subsequently, in April 2014, Germany extradited Romano Pisciotti, an Italian citizen, to the United States to face charges of bid-rigging, price-fixing, and market allocation in connection with the global marine hose cartel.[53] Pisciotti became the first person ever extradited to the United States based exclusively on antitrust charges.[54] His extradition occurred only after he was arrested pursuant to an Interpol Red Notice[55] while changing planes in Frankfurt en route from Italy to Nigeria.[56] In November 2014, the Division announced the extradition of John Bennett, a Canadian national, in a case involving kickbacks, fraud, and bid-rigging at an Environmental Protection Agency Superfund site, but the extradition did not involve a Sherman Act violation.[57] Finally in October 2016, subsequent to the issuance of a Red Notice, the Division secured the extradition from Bulgaria of an Israeli national, Yuval Marshak, a former owner and executive of an Israel-based defense contractor, on multiple fraud charges stemming from a bid-rigging scheme.[58] However, even after Norris, Porath, Pisciotti, Bennett, and Marshak — all of whom pleaded or were found guilty —

[51] Krotoski, *supra* note 34, at 6 ("On February 16, 2012, Porath was extradited to the United States.").

[52] *Id.*

[53] *See First Ever Extradition on Antitrust Charge*, U.S. DEP'T JUST. (Apr. 4, 2014), https://www.justice.gov/opa/pr/first-ever-extradition-antitrust-charge.

[54] Krotoski, *supra* note 34, at 3.

[55] Briggerman et al., *supra* note 49.

[56] *See* Tobias Caspary & Lars Goerlitz, *From Frankfurt to Behind American Bars — the Story of Romano Pisciotti and its Impact on Executives Working for Companies Involved in Cartel Behaviour*, FRIED FRANK 1 (July 29, 2014), http://www.friedfrank.com/siteFiles/Publications/Finalv3-%2007.28.2014%20-%20TOC%20Memo%20-%20From%20Frankfurt%20to%20Behind%20American%20Bars.pdf (describing Pisciotti's arrest and extradition).

[57] Krotoski, *supra* note 34, at 4.

[58] *See* Rachel S. Brass et al., *2016 Year-End Criminal Antitrust and Competition Law Update*, GIBSON DUNN pt. I(A)(b) (Jan. 10, 2017), http://www.gibsondunn.com/publications/Pages/2016-Year-End-Criminal-Antitrust-and-Competition-Law-Update.aspx.

successful extradition of foreign executives in antitrust cases has been the exception rather than the norm.[59] To date, the DOJ has secured only one extradition — that of Pisciotti — exclusively on antitrust charges.[60]

II. THE YATES MEMORANDUM AND THE DOJ'S LENIENCY PROGRAM

In what respects will the Yates Memorandum change the foregoing landscape? At the outset, it is important to underscore that the Yates Memorandum is unlikely to significantly change one of the key elements of the Division's enforcement arsenal — the Leniency Program, which was first implemented for corporations in 1978, dramatically expanded in 1993, and then extended to individuals in 1994.[61] The Leniency Program incentivizes corporations and individuals to self-report their cartel activity and cooperate in the Division's investigation to avoid criminal convictions, fines, and prison sentences. Leniency also significantly reduces damages exposure in parallel civil class action cases,[62] while prosecution by other countries for cross-border conduct, however, remains a significant risk.

To be eligible for the Leniency Program, a successful applicant must make full disclosure of its cartel activity and provide full, continuing, and complete cooperation. The required cooperation includes the production of all documents, information, or other materials in the applicant's possession, custody, or control, wherever located, that are requested by the Division in connection with the criminal antitrust investigation and are not protected by the attorney-client privilege or

[59] *See Extradition for U.S. Antitrust Crimes: An Anomaly or the New Normal?*, QUINN EMANUEL (Aug. 2015), http://www.quinnemanuel.com/the-firm/news-events/article-august-2015-extradition-for-us-antitrust-crimes-an-anomaly-or-the-new-normal (expressing doubt that extradition for antitrust crimes will become common) [hereinafter *Extradition for U.S. Antitrust Crimes*].

[60] Briggerman et al., *supra* note 49. In November 2017 the European Court of Justice concluded that Pisciotti's extradition to the United States on criminal antitrust charges was justified. *See* Everett, Jr. et al., *2017 Global Cartel Enforcement Report*, *supra* note 11, at 34.

[61] Elizabeth Prewitt et al., *DOJ Narrows Path to Immunity for Antitrust Crimes*, LAW360 (Jan. 19, 2017, 8:48 PM), https://www.law360.com/articles/882090/doj-narrows-paths-to-immunity-for-antitrust-crimes.

[62] Douglas Tween, Thomas McGrath & Yumiko Kato, *U.S. DOJ Antitrust Division Updates Leniency Program FAQs*, LINKLATERS 1 (Feb. 2017), https://lpscdn.linklaters.com/-/media/files/linklaters/pdf/mkt/newyork/doj-faq-update_february-2017.ashx.

attorney work product doctrine.[63] If a corporation meets the requirements of the Leniency Program, the Antitrust Division has virtually no discretion to deny the amnesty application.[64]

The Leniency Program has been remarkably effective during the past few decades in uncovering illegal cartel conduct.[65] By July 2017, it had been adopted in form by at least sixty-five foreign jurisdictions,[66] including such economic powers as Australia, Brazil, Canada, China, the EU, France, Germany, Hong Kong, India, Italy, Japan, Mexico, Russia, Singapore, South Africa, South Korea, Spain, and the United Kingdom.[67] The DOJ has described this global proliferation as "[t]he single most significant development in cartel enforcement."[68] The success of the Leniency Program also has spurred proposals for the DOJ's Fraud Section to adopt an analogous FCPA leniency policy.[69] Indeed, early draft versions of the FCPA Pilot Program, created by the DOJ in April 2016[70] and made permanent in November 2017[71] as an

[63] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION 50 (Jan. 13, 2017), https://www.justice.gov/atr/internationalguidelines/download.

[64] NIALL E. LYNCH, LATHAM & WATKINS LLP, IMMUNITY IN CRIMINAL CARTEL INVESTIGATIONS: A US PERSPECTIVE 3 (2011), https://www.lw.com/presentations/immunity-in-criminal-cartel-investigations-us-perspective.

[65] *See, e.g.*, WERDEN ET AL., *supra* note 24, at 14 ("[T]he Antitrust Division's leniency program is now the most important tool either for detecting cartels or for developing the evidence necessary to prosecute them."); Christopher R. Leslie, *Replicating the Success of Antitrust Amnesty*, 90 TEX. L. REV. SEE ALSO 171, 172 (2012) (describing the Leniency Program as "wildly successful").

[66] *See* Joseph E. Harrington, Jr. & Myong-Hun Chang, *When Can We Expect a Corporate Leniency Program to Result in Fewer Cartels?*, 58 J.L. & ECON. 417, 418 (2015) ("Globally, leniency programs are now present in more than 50 countries and jurisdictions.").

[67] *See* Omar Shah et al., *2017 Mid-Year Global Cartel Enforcement Report*, MORGAN LEWIS 17 (July 25, 2017), https://www.morganlewis.com/documents/m/documents/cartel/2017-mid-year-cartel-report-july2017.pdf (identifying sixty-six jurisdictions with cartel immunity/leniency programs).

[68] *See* Hammond, *supra* note 32, at 1.

[69] *See, e.g.*, Robert W. Tarun & Peter P. Tomczak, *A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 212-22 (2010).

[70] *See* U.S. DEP'T OF JUSTICE, *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance*, JUSTICE.GOV (Apr. 5, 2016), https://www.justice.gov/criminal-fraud/file/838416/download.

[71] *See* Rod Rosenstein, Deputy Attorney Gen., U.S. Dep't of Justice, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign (announcing that the modified Pilot Program had been made permanent).

FCPA-specific application of the Yates Memorandum, tracked the Leniency Program.[72] The early drafts did so by providing more concrete guarantees of declinations of prosecution in exchange for voluntary self-disclosures and cooperation against individuals.[73] Senior DOJ officials ultimately rejected this tracking primarily because FCPA violations rarely mimic cartel conduct — cartels involve conspiracies between multiple companies but FCPA violations typically do not.[74]

The Yates Memorandum is widely expected to have no direct impact on the Leniency Program,[75] which the Division most recently updated in January 2017.[76] Both the Memorandum and the revised USAM prohibit corporate resolutions from immunizing individuals or dismissing charges against them, except in extraordinary circumstances.[77] But this prohibition does not apply to applications submitted under the Leniency Program.[78]

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[72] *See* PHILIP UROFSKY & DANFORTH NEWCOMB, SHEARMAN & STERLING LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 13 (July 2016), https://www.shearman.com/-/media/Files/NewsInsights/Publications/2016/06/Shearman—Sterlings-Recent-Trends-and-Patterns-in-the-Enforcement-of-t.pdf (noting that early versions of FCPA Pilot Program "would essentially have paralleled the Antitrust Division's leniency program").

[73] *See id.*

[74] *See* PHILIP UROFSKY & BRIAN G. BURKE, SHEARMAN & STERLING LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 19 (Jan. 2018), https://www.shearman.com/-/media/Files/Perspectives/2018/01/January-2018-FCPA-Digest-Recent-Trends.pdf ("[W]hereas antitrust cartel cases by definition involve a horizontal conspiracy involving at least two — and usually more — competitors, FCPA cases are more likely to involve a single company or, at most, a vertical structure involving the company and one or more agents or intermediaries.").

[75] *See, e.g.*, James W. Cooper et al., *Yates Memo May Change DOJ Cartel Enforcement*, LAW360 (Sept. 17, 2015, 10:21 AM), https://www.law360.com/articles/703818/yates-memo-may-change-doj-cartel-enforcement ("[T]he DOJ will not release individuals from criminal or civil liability in corporate resolutions except . . . where there are approved DOJ policies such as the Antitrust Division's Corporate Leniency program.").

[76] *See generally* U.S. DEP'T OF JUSTICE, FREQUENTLY ASKED QUESTIONS ABOUT THE ANTITRUST DIVISION'S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS (Jan. 26, 2017), https://www.justice.gov/atr/page/file/926521/download [hereinafter FREQUENTLY ASKED QUESTIONS].

[77] *See* Rachel Brass et al., *2015 Year-End Criminal Antitrust and Competition Law Update*, GIBSON DUNN pt. I(A)(4)(b) (Jan. 7, 2016), http://www.gibsondunn.com/publications/Pages/2015-Year-End-Criminal-Antitrust-and-Competition-Law-Update.aspx ("Corporate resolution may only immunize individual conduct in 'extraordinary circumstances,' including in the context of the Corporate Leniency Program.").

[78] *See id.*

III. COOPERATION CREDIT UNDER THE YATES MEMORANDUM

As noted above, the Yates Memorandum will have no direct impact on the operation of the Leniency Program. So what will change? First, companies under investigation likely will be required to disclose more information, perhaps significantly more information, about their own culpable executives in order to obtain cooperation credit. Such credit can be extremely valuable to a corporation because it is one of three primary factors determining the size of a fine in a criminal antitrust case. The others are (1) the volume of commerce, which is a measure of the sale of goods or services impacted by the antitrust conspiracy, and (2) the culpability score, which is determined by assessing multiple sub-factors, including the size of the company, its prior history, and its acceptance of responsibility.[79] The third factor, cooperation credit, can reduce a fine by hundreds of millions of dollars.[80]

Not every company applies for leniency "for reasons malicious and benign."[81] Before the Yates Memorandum, those companies seeking cooperation credit without applying for leniency generally did not exert themselves to implicate their own executives in criminal cartel conduct. Instead, they typically provided only the minimum information required for a resolution.[82] The minimum often included disclosing the conduct of colluding competitors, producing documents located in foreign countries, and making available at the company's expense witnesses beyond the reach of the federal grand jury.[83] The foregoing level of cooperation will no longer suffice, because the Yates Memorandum ties a company's cooperation credit to the disclosure of specific information about the company's executives.

The Yates Memorandum also may indirectly impact leniency applications. The DOJ's Criminal Division has already demonstrated its reluctance to grant cooperation credit post-Yates.[84] This reluctance may complicate hybrid cases, such as bid-rigging, in which the company's conduct constitutes both an antitrust violation and a

[79] Seebald & Schnapp, *supra* note 45, at 2.

[80] *See id.* at 2-3 (noting that Yazaki Corporation's final $470 million fine had been reduced by about $200 million to reflect its cooperation with the DOJ's investigation of price-fixing in the automotive parts industry).

[81] Norton Rose Fulbright, *The Yates Memo — a Renewed US Focus on Individual Misconduct in Corporate Investigations*, Q. 2 COMPETITION WORLD 17, 17 (2016), http://www.nortonrosefulbright.com/files/competition-world—q2-2016-141176.pdf.

[82] *See* Bloch et al., *supra* note 10, at 6.

[83] *See* Cooper et al., *supra* note 75.

[84] *See* Brass et al., *supra* note 58, pt. I(B)(a)(ii).

violation of other criminal statutes that are within the purview of the Criminal Division. When these companies apply for the Leniency Program, it is not unlikely that they will be referred to the Criminal Division. And the Criminal Division might have a stricter view than the Antitrust Division of what constitutes effective cooperation or might require a guilty plea as a condition of settlement. This is not mere conjecture — the Criminal Division often requires guilty pleas.[85] The overall effect would discourage companies from self-reporting antitrust violations, thereby undermining the objectives of both the Leniency Program and the Yates Memorandum.[86]

IV. FOREIGN EXECUTIVES AND EXTRADITION

A second effect of the Yates Memorandum in the field of cartel enforcement is that foreign executives are increasingly likely to face antitrust charges in the United States. The Yates Memorandum emphasizes both corporate cooperation and the prosecution of individuals, including the culpable executives of multinational corporations who reside abroad. In combination with the expanding criminalization of cartel offenses in other countries and the Division's recent moderate success in extraditing foreign executives,[87] this emphasis indicates that such executives are more likely than ever to confront criminal prosecution in the United States.[88]

However, there are numerous obstacles to an acceleration of this trend. The DOJ must successfully serve process on individual defendants living abroad, which is a complicated task. The United States can request assistance through a mutual legal assistance treaty ("MLAT"), which generally provides for assistance in, *inter alia*,

[85] *See id.* ("[T]he DOJ Criminal Division . . . often requires corporate guilty pleas as a condition of settlement.").

[86] *See id.* ("Indeed, the prospect that an application for leniency might be referred to the Criminal Division, which often demands a plea of guilty, places an almost irreversible thumb on the scale in favor of not self-reporting possible antitrust violations to the Antitrust Division, or at least substantially delaying self-reporting until the corporation has fully investigated the conduct and understands all relevant facts.").

[87] *See supra* notes 51–58 and accompanying text.

[88] *See* Bloch et al., *supra* note 10, at 8; Matthew J. Siembieda & Edward D. Duffy, *The Yates Memo: How Does it Actually Affect Criminal Antitrust Enforcement?*, INSIDE COUNSEL (June 28, 2017, 5:04 PM), https://www.law.com/insidecounsel/almID/595419d1140ba0331823894d ("The primary impact of the Yates Memo on antitrust enforcement has been to accelerate the DOJ's focus on individual employees, including efforts to secure their documents or testimony early in the investigation process.").

serving judicial or other documents, locating or identifying persons or things, obtaining documents or electronic evidence, and taking testimony, in one jurisdiction at the request of another.[89] MLATs assist the DOJ in obtaining evidence from foreign entities for use in United States domestic criminal investigations, but they often contain exceptions under which foreign authorities are not required to act. One common exception is where the conduct at issue would not constitute a criminal offense under the laws of the foreign jurisdiction.[90] Further, even without the exception, the MLAT process remains burdensome because foreign agencies typically are slow to respond to requests from the United States to provide assistance.[91] Finally, numerous foreign countries have not signed MLATs with the United States. More than 60 countries have done so,[92] but more than 100 have not.

In the absence of an MLAT, the DOJ must request assistance through the cumbersome and uncertain process of obtaining letters rogatory. Counsel seeking such letters must obtain approval from a United States district court, have the letters transmitted from the State Department's Bureau of Consular Affairs to the foreign country through diplomatic channels, and then await approval by a judge in that country.[93] Letters rogatory are based primarily on the international legal principles of comity and reciprocity, and thus compliance with them is subject to the discretion of the receiving jurisdiction.[94] Foreign governments have no legal obligation to accept

[89] *See* Virginia M. Kendall & T. Markus Funk, *The Role of Mutual Legal Assistance Treaties in Obtaining Foreign Evidence*, 40 LITIGATION 59, 60 (Winter 2014), https://www.perkinscoie.com/images/content/3/1/31795.pdf (enumerating types of assistance usually provided for in an MLAT).

[90] Briggerman et al., *supra* note 49.

[91] Joan E. Meyer, *1 Year After Yates Memo: The DOJ's Yates-Lite Approach*, LAW360 (Oct. 19, 2016, 5:19 PM), https://www.law360.com/articles/841773/1-year-after-yates-memo-the-doj-s-yates-lite-approach.

[92] *See* Susan E. Brune & Erin C. Dougherty, *Representing Individuals in International Investigations*, 40 CHAMPION 38, 43 (Sept./Oct. 2016), https://www.brunelaw.com/publications/2016-10-20-representing-individuals-in-international-investigations/_res/id=Attachments/index=0/Brune_Representing_Individuals_Sept-Oct_2016.pdf ("The United States has now entered into MLATs with more than 60 foreign nations.").

[93] *See* T. MARKUS FUNK, FED. JUDICIAL CTR., MUTUAL LEGAL ASSISTANCE TREATIES AND LETTERS ROGATORY: A GUIDE FOR JUDGES 22 (2014), https://www.fjc.gov/sites/default/files/2017/MLAT-LR-Guide-Funk-FJC-2014.pdf (outlining the typical outgoing letter rogatory process). The statutory authority for letters rogatory is found in 28 U.S.C. § 1781 (2018).

[94] Kirby Behre & Lauren Briggerman, *The Impact of Cross-Border Cartel*

or execute letters rogatory, and the letters may be subject to challenge in the recipient country.[95] When they do respond, it may take them several years, at which point the requested evidence is often no longer useful.[96]

If served abroad, defendants may refuse to submit to United States jurisdiction, in which case the DOJ's ability to prosecute will depend on successful extradition. The Division has acknowledged the uphill battle in extraditing foreign nationals on antitrust charges.[97] This acknowledgement is appropriate. Although the United States has entered into bilateral extradition treaties with more than 100 countries[98] and is a party to two multilateral extradition agreements,[99] the absence of treaties with other nations has stymied cartel enforcement by the DOJ.[100] Historically, the United States entered into bilateral "list" treaties that enumerated extraditable offenses, often to the exclusion of modern white-collar crimes.[101] More recent treaties require dual criminality — an offense becomes extraditable if it constitutes a crime in both the United States and the surrendering jurisdiction punishable by more than one year of imprisonment.[102]

Enforcement Challenges Confronting the United States on the Americas, 23 WESTLAW ANTITRUST J. 1, 5 (Sept. 2015), https://www.millerchevalier.com/sites/default/files/resources/WLJ_Cross_Border_Cartel_Enforcement_Challenges.pdf.

[95] *See* Ashish S. Joshi, *Expanding Globalization Leads to Increasingly Aggressive Cross-Border Investigations*, ASPATORE, 2014 WL 4785238, at *5 (Aug. 2014).

[96] *See id.*

[97] Briggerman et al., *supra* note 49 (citing *Memorandum of Understanding between the Antitrust Division, U.S. Department of Justice and the Immigration and Naturalization Service*, U.S. DEP'T JUST. (Mar. 15, 1996), http://www.justice.gov/atr/public/criminal/9951.pdf).

[98] Krotoski, *supra* note 34, at 3.

[99] *See* Extradition Convention Between the United States of America and Other American Republics, Dec. 26, 1933, 49 Stat. 3111; Extradition Agreement with the European Union, June 25, 2003, S. Treaty Doc. No. 109-14.

[100] *See, e.g.*, Lauren E. Briggerman et al., *Executives at Risk: Navigating Individual Exposure in Government Investigations — Volume II*, MILLER & CHEVALIER (Jan. 7, 2016), https://www.millerchevalier.com/publication/executives-risk-navigating-individual-exposure-government-investigations-volume-ii (noting that the United States does not have an extradition treaty with Taiwan and the DOJ's agreement to a greatly discounted term of incarceration in a color display tube cartel case was the result of its inability to extradite a Taiwanese executive).

[101] William Barry et al., *Individuals in Cross-Border Investigations or Proceedings: The US Perspective*, GLOB. INVESTIGATIONS REV. § 17.2.1 (Jan. 4, 2017), http://globalinvestigationsreview.com/insight/the-practitioner%E2%80%99s-guide-to-global-investigations/1079328/individuals-in-cross-border-investigations-or-proceedings-the-us-perspective.

[102] *See* Thomas & De Stefano, *supra* note 42, at 3 ("[T]he alleged antitrust violation must be considered punishable under the criminal laws of both the requesting and the

The dual criminality rule does not require that the criminal laws of the two countries be identical, but they must be substantially similar or analogous.[103] For example, Germany does not criminalize price-fixing but it does criminalize bid-rigging, and this sufficed to satisfy the dual criminality requirement in Pisciotti's case.[104] Even so, the common requirement of dual criminality still presents a major impediment to extradition of foreign individuals in cartel cases.[105] Today, most bilateral extradition treaties contain dual criminality clauses.[106] More than 30 countries have criminalized cartel conduct, but more than 100 countries have not.[107] Relying on alternative charges related to cartel conduct is one possible solution to meet the dual criminality requirement. For example, whereas the number of countries criminalizing price-fixing remains small, numerous jurisdictions criminalize conduct similar or equivalent to obstruction of justice.[108] The DOJ has increasingly relied on such alternative charges as obstruction and fraud when seeking extradition.[109]

surrendering jurisdictions: this is the double-criminality requirement."); *see also* Amy Jeffress, Samuel Witten & Jamen Elizabeth Tyler, *Demystifying International Extradition*, LAW360 (Feb. 10, 2017, 11:34 AM), https://www.law360.com/articles/888195/demystifying-international-extradition ("Treaties agreed upon prior to the 1970s typically include a negotiated list of specific extraditable offenses . . . and only allow extradition for the crimes that are listed in the treaty. Modern treaties have largely done away with these lists, however, and use a 'dual criminality' approach instead.").

103 *See* Shapiro v. Ferrandina, 478 F.2d 894, 908 (2d Cir. 1973) ("The law does not require that the name by which the crime is described in the two countries shall be the same . . . . It is enough if the particular act charged is criminal in both jurisdictions." (quoting Collins v. Loisel, 259 U.S. 309, 312 (1922)); Brune & Dougherty, *supra* note 92, at 41.

104 *See* Himes & Julius, *supra* note 44, at 127.

105 *See id.* at 123 ("Dual criminality can impose a significant obstacle to extradition on U.S. antitrust charges.").

106 Caspary & Goerlitz, *supra* note 56, at 4.

107 *See Extradition for U.S. Antitrust Crimes*, *supra* note 59 ("[T]here are still a large number of countries where antitrust offenses do not carry criminal penalties, and in virtually every country with a criminal antitrust enforcement regime, the United States has yet to extradite an antitrust fugitive successfully.").

108 *See* Brian Byrne, Shaun Goodman & Ilya Shapiro, *Extending the Long Arm of US Antitrust Law: The Ian Norris Extradition Battle*, GLOB. COMPETITION REV. 13, 14 (Dec. 2005/Jan. 2006), https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/publication-pdfs/extending-the-long-arm-of-us-antitrust-law—the-ian-norris-extradition-battle.pdf ("Very few countries make price-fixing a criminal offence . . . . [T]he justice department will take an aggressive approach, having argued . . . that price-fixing charges would equate to the common law 'conspiracy to defraud.'").

109 *See* Bob Bloch, *Corrected: Trends in Criminal Cartel Enforcement*, LAW360 (Jan. 15, 2015, 11:13 AM), https://www.law360.com/articles/608449/corrected-trends-in-

Modern extradition treaties commonly include provisions allowing extradition for extraterritorial conduct,[110] and most modern treaties prohibit a declination of extradition on the basis of nationality. However, a number of the key treaty partners of the United States, including Brazil, France, and Germany, have domestic laws or constitutional provisions that generally preclude the extradition of their own citizens.[111] Pisciotti, an Italian citizen, would not have been extradited by Germany had he been a German citizen. German national Uwe Bangert, who was indicted by the DOJ as a co-conspirator in the same marine hose cartel that involved Pisciotti, remains a fugitive from the United States while living openly in Germany.[112] Similarly, Japan, which has publicly criticized efforts by the United States to target overseas cartel conduct,[113] has never extradited its own citizens to this country to confront prosecution for an antitrust offense.[114] According to the DOJ, more than forty-two Japanese, Korean, and Taiwanese executives who have been indicted in price-fixing cases remain fugitives outside the United States.[115]

Similarly, the primary obstacle to the DOJ's ability to secure convictions of Swiss bankers in connection with their facilitation of United States taxpayers' tax evasion has been caps on the DOJ's ability to secure extradition.[116] And it may be impossible for the DOJ to prosecute German Volkswagen ("VW") executives in a United States court in connection with that company's widespread illegal use of devices specifically designed to circumvent federal emissions standards, given Germany's general prohibition on extraditing its own

criminal-cartel-enforcement.

110 John Carroll & Richard Rothblatt, *The Long Arm of the Law*, LEGAL WEEK 22, 23 (May 27, 2010), https://www.skadden.com/-/media/files/publications/2010/05/publications2114_0.pdf.

111 Barry et al., *supra* note 101, § 17.2.3.

112 *See* Shepard Goldfein & James A. Keyte, *'Pisciotti': Justice Department's First Ever Antitrust Extradition*, N.Y. L.J. (June 10, 2014), https://www.skadden.com/-/media/files/publications/2014/06/070061420-skadden.pdf; Melissa Lipman, *DOJ's Extradition Win Ramps Up Pressure on Foreign Execs*, LAW360 (Apr. 4, 2014, 7:51 PM), https://www.law360.com/articles/525227/doj-s-extradition-win-ramps-up-pressure-on-foreign-execs.

113 Briggerman et al., *supra* note 49.

114 *See* Thomas & De Stefano, *supra* note 42, at 5 n.43 ("[N]o one from Japan has ever been known to petition for a transfer.").

115 *See* Goldfein & Keyte, *supra* note 112.

116 Michael C. Gross, Carolyn H. Kendall & Aaron S. Mapes, *Will Volkswagen Executives Be the Yates Memo's First Casualties?*, BLOOMBERG BNA DAILY ENVTL. REP. (Jan. 4, 2016), http://www.postschell.com/site/files/post__schell__will_volkswagen_executives_be_the_yates_memos_first_casualties__bloomberg_bna__dec_15.pdf.

citizens (except within the EU).[117] Six high-level German VW executives were indicted in the United States in connection with the emissions scandal in January 2017, but their extraditions are unlikely.[118]

Other extradition treaties vest discretion in the requested country to decide whether to extradite its own nationals, or provide it with the authority to refuse extradition if the requesting country intends to criminally prosecute the subject individual.[119] In practice, extradition decisions "are part judicial and part foreign policy,"[120] and the DOJ has experienced substantial difficulty in persuading other nations to extradite their citizens to the United States to face criminal charges in a variety of cases.[121] Extradition remains an arduous process even where there is an applicable bilateral treaty, and the complications multiply in criminal antitrust cases.[122] To illustrate, the Division pursued Norris's extradition for more than six years and Bennett's for more than five years.[123] Pisciotti's extradition took three years after the DOJ indicted him under seal.[124]

V. CIVIL LIABILITY FOR ANTITRUST OFFENSES

Criminal prosecutions of individuals involved in cartel activity are likely to remain a top priority of the DOJ following the issuance of the Yates Memorandum.[125] But another key development is the increased risk of imposing civil liability against executives. The Yates Memorandum expressly states that the conditions for cooperation

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[117] Arnold W. Reitze, Jr., *The Volkswagen Air Pollution Emissions Litigation*, 46 ENVTL. L. REP. NEWS & ANALYSIS 10564, 10571 (July 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2805186##.

[118] *See* Karin Matussek, *VW Managers Safe from Extradition, as Long as They Stay Home*, BLOOMBERG (Jan. 12, 2017, 11:37 AM), https://www.bloomberg.com/news/articles/2017-01-12/five-vw-executives-safe-from-u-s-extradition-in-home-country.

[119] Brune & Dougherty, *supra* note 92, at 41.

[120] Barry et al., *supra* note 101, § 17.2.2.

[121] Briggerman et al., *supra* note 100.

[122] *See Extradition for U.S. Antitrust Crimes*, *supra* note 59 ("Extradition is a complicated process in any context, but the nuances of criminal antitrust laws outside of the United States make extraditions particularly difficult to obtain for antitrust charges.").

[123] Krotoski, *supra* note 34, at 7-8.

[124] *See* Briggerman et al., *supra* note 49.

[125] *See, e.g.*, ALLEN & OVERY LLP, GLOBAL CARTEL ENFORCEMENT: 2017 FULL-YEAR CARTEL REPORT 10 (2018), http://www.allenovery.com/SiteCollectionDocuments/2017%20Full%20Year%20Cartel%20Report.pdf ("Prosecutions of individuals involved in cartel activity look set to be a continuing DOJ priority in 2018.").

credit will apply with equal force in both the civil and criminal contexts, and a company under civil investigation must provide to the DOJ all relevant facts about individual misconduct in order to receive any consideration in the negotiation.[126] Pursuant to this directive, a new section entitled "Pursuit of Claims against Individuals" was added to Title 4 of the USAM to implement the six standards set forth in the Yates Memorandum, as applied to civil matters. The USAM now provides that civil corporate investigations should focus on individuals from the inception and that a determination as to whether to bring suit against an individual should not be based solely on that person's ability to pay civil penalties.[127] Consistent with both the Yates Memorandum and the subsequent USAM revision, the Division announced that it will consider bringing civil enforcement actions against individuals alleged to have participated in price-fixing.[128]

By early-2018, the Antitrust Division had not yet provided guidance on whether and when it will pursue civil actions against individuals. Indeed, the Antitrust Division Manual — last updated in August 2017 — still does not specifically address the inclusion of individuals in civil enforcement actions.[129] Nevertheless, such enforcement is expected to occur. This would constitute a major antitrust policy modification insofar as civil antitrust enforcement action historically has involved charges only against companies.[130] The new approach appears to be designed to generate a deterrent effect to slash the recidivism rate for cartel behavior.[131] This has some intuitive logic because cartel recidivism may be significant, at least at the firm

[126] *See supra* Part III.

[127] *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 4-3.100 (Nov. 2015).

[128] Bloch et al., *supra* note 10, at 8.

[129] *See* ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL (Aug. 2017), https://www.justice.gov/atr/file/761166/download; *see also Antitrust Division Vows to Sue More Company Executives in Civil Antitrust Actions*, THOMPSON HINE LLP (Dec. 15, 2015), http://www.thompsonhine.com/publications/antitrust-division-focuses-on-individuals-in-civil-antitrust-actions ("In fact, the Division's Policy Manual does not address including individuals in civil cases.").

[130] Nathaniel J. Harris, *Antitrust Alert: DOJ Statements May Signal Civil Antitrust Enforcement Against Individual Employees*, JONES DAY (Nov. 2015), http://www.jonesday.com/antitrust-alert—doj-statements-may-signal-civil-antitrust-enforcement-against-individual-employees-11-23-2015.

[131] *See* Daniel Wilson, *DOJ Official Says Yates Memo Ups Civil Antitrust Scrutiny*, LAW360 (Mar. 11, 2016, 5:36 PM), https://www.law360.com/articles/770447/doj-official-says-yates-memo-ups-civil-antitrust-scrutiny (citing David I. Gelfand, then-Deputy Assistant Attorney General for Litigation).

level.[132] But because civil penalties imposed against directors and officers for cartel behavior are likely to be borne by their companies' indemnity policies,[133] it is not clear that deterrence will be accomplished.

VI. POST-YATES CARVE-OUTS

The Yates Memorandum also may change the Division's carve-out decisions. Before the Memorandum, corporate plea agreements resolving antitrust violations usually provided a guarantee of non-prosecution in the future to both the company signing the plea agreement and current and former employees who cooperated with the Division's investigation, except for those specifically carved-out.[134] These non-prosecution guarantees often immunized the majority of "culpable" employees,[135] a term that has not been clearly defined by the DOJ,[136] but also carved-out a discrete number of individuals[137] who were potential targets of the investigation and were not protected.[138] Typically, the most culpable employees were carved-out in the very late process of the plea negotiation[139] and often targeted for criminal prosecution thereafter.[140] Beginning in 2013, the Division no

[132] *See* Sokol, *supra* note 4, at 792 ("DOJ Antitrust claims that there is no cartel recidivism. In contrast, academic studies claim that recidivism may be significant.").

[133] *See* Wilson, *supra* note 131.

[134] *See DOJ Antitrust Division Announces Changes to Corporate Plea Agreement Policy*, CROWELL & MORING LLP (Apr. 15, 2013), https://www.crowell.com/NewsEvents/AlertsNewsletters/all/DOJ-Antitrust-Division-Announces-Changes-to-Corporate-Plea-Agreement-Policy/pdf ("The Antitrust Division's plea agreements for criminal antitrust violations customarily include language that includes current and former corporate employees and executives in the non-prosecution and other provisions . . . .").

[135] *See* Harris, *supra* note 130.

[136] *See* Seebald & Schnapp, *supra* note 45, at 6 ("Who is a culpable employee? Thus far, there is no definitive guidance from the DOJ, and it is not an easy question to answer.").

[137] The discrete number of individuals is usually between two and eight people. *See* Michael L. Spafford, Lee F. Berger & Matthew T. Crossman, *The Yates Memorandum and Antitrust Leniency*, CAL. L. ASS'N (Jan. 2016) (noting that before the Yates Memo, the practice had been to carve out of the plea agreement two to eight individuals for each cooperating corporation).

[138] *See* Cooper et al., *supra* note 75 ("These nonprosecution assurances often exclude a discrete and limited number of individuals . . . from the nonprosecution protections afforded by the company's plea agreement.").

[139] *See* Seebald & Schnapp, *supra* note 45, at 7 ("Carve out decisions are made very late in the plea process.").

[140] *See* Harris, *supra* note 130 ("The most culpable employees are typically 'carved

longer carved-out employees for reasons unrelated to culpability, such as non-cooperation.[141] In recent years before the Yates Memorandum was issued, the DOJ prosecuted about thirty-eight percent of carve-outs in international cartel investigations,[142] although alternative estimates are lower.[143]

Who gets carved-out of corporate plea agreements in cartel cases? The DOJ generally considers three factors when deciding which current culpable employees to carve-out: (1) the individual's role in the cartel offense, (2) the seniority of culpable executives, and (3) the employee's potential cooperation.[144] After the Yates Memorandum, it will be increasingly difficult for defense counsel to argue, and for prosecutors to justify, that high-level executives should be carved-in to corporate plea agreements, at least in the absence of substantial corporate disclosure about the executives' conduct. This difficulty is likely to prompt prosecutors to carve-out more executives in the future.[145]

The carve-out framework also is a key feature of the Leniency Program, and the Yates Memorandum expressly preserves it. Thus, the framework survives even though it appears to conflict with the Yates Memorandum's admonition that no corporate resolution will provide protection from criminal or civil liability for any individuals absent extraordinary circumstances or approved departmental policy. Indeed, the 2017 revision to the Leniency Program makes two changes that increase the likelihood of carve-outs.[146] The first change concerns current employees. The Program offers two categories of leniency — A

out' of th[e] immunity and may be (often are) later prosecuted criminally.").

[141] *See Statement of Assistant Attorney General Bill Baer on Changes to Antitrust Division's Carve-out Practice Regarding Corporate Plea Agreements*, U.S. DEP'T JUST. (Apr. 12, 2013), https://www.justice.gov/opa/pr/statement-assistant-attorney-general-bill-baer-changes-antitrust-division-s-carve-out ("[W]e will no longer carve out employees for reasons unrelated to culpability.").

[142] *See* Bloch, *supra* note 109 (noting an increase to almost sixty percent in prosecutions of carve-outs in automotive parts investigation).

[143] *See, e.g.*, Jeremy Evans, *DOJ Antitrust Drops Its "Scarlet Letter" Policy*, PAUL HASTINGS LLP 1 (Apr. 2013), https://www.paulhastings.com/docs/default-source/PDFs/doj_antitrust_drops_its_scarlet_letter_policy.pdf (noting that criminal prosecutions were initiated against fewer than one-fifth of the carve-outs in certain, recent cartel investigations).

[144] Marc Siegel & Eric P. Enson, *DOJ Antitrust Corporate Dispositions May Protect Some Culpable Employees*, JONES DAY (Aug. 2017), http://www.jonesday.com/doj-antitrust-corporate-dispositions-may-protect-some-culpable-employees-08-07-2017.

[145] *See* Bloch et al., *supra* note 10, at 8 ("[T]he Yates Memorandum could prompt prosecutors to 'carve-out' a large number of individual executives.").

[146] *See supra* notes 76–78 and accompanying text.

and B.[147] The former category encompasses cases where the DOJ had no prior knowledge about the potentially illegal antitrust conduct until the company applied, whereas the latter category includes cases where the DOJ already had some knowledge.[148] The 2017 revision specifically notes that the Division may exercise its discretion to carve-out current Category B employees who are found to be *highly culpable*[149] — language that was absent from the prior iteration.[150]

The second charge concerns former employees. The 2017 revision establishes stricter standards for extending leniency to former directors, officers, and employees.[151] Previously, such leniency was discretionary, rather than automatic. Now, former directors, officers, and employees are presumptively excluded from any grant of corporate leniency. They are only eligible for leniency if they provide substantial, noncumulative cooperation against remaining potential targets, or when their cooperation is necessary for the leniency applicant to make a confession of criminal antitrust activity that would qualify for leniency.[152] This revision may discourage former employees from cooperating with an internal investigation, but it is consistent with the Yates Memorandum's focus on criminal accountability for individual offenders.[153]

The foregoing conclusion that carve-outs will increase is reinforced by the fact that after the Yates Memorandum was issued the DOJ adopted new internal procedures designed to ensure that each of its criminal offices systematically identifies all potentially culpable individuals as early in the investigative process as feasible, and that the Division brings antitrust cases against individuals as quickly as evidentiary sufficiency permits.[154] After the Yates Memorandum, the

147 *See* Warren Feldman et al., *DOJ Updates Leniency Program FAQs*, SKADDEN 2 (Jan. 27, 2017), https://www.skadden.com/-/media/files/publications/2017/01/doj_updates_leniency_program_faqs.pdf (explaining revision to Leniency Program).

148 *See id.*

149 *See* FREQUENTLY ASKED QUESTIONS, *supra* note 76, at 20-21.

150 *But cf.* Siegel & Enson, *supra* note 144 ("DOJ typically does not end up carving out current employees, even highly culpable ones, unless DOJ already has sufficient information to prosecute these highly culpable employees at the time the leniency application is made (which is highly unlikely).").

151 *See* Byron Tuyay, *DOJ Announces Updates to Antitrust Leniency Program*, WILSON SONSINI GOODRICH & ROSATI (Jan. 19, 2017), https://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgralert-antitrust-leniency-program.htm.

152 FREQUENTLY ASKED QUESTIONS, *supra* note 76, at 22.

153 Prewitt et al., *supra* note 61.

154 *See* Snyder, *Individual Accountability*, *supra* note 19.

Division also is more comprehensively reviewing the organizational structure of culpable companies in an effort to ensure that it identifies and investigates all senior executives who potentially condoned, directed, or participated in criminal cartel behavior.[155] Those executives who are carved-out are increasingly likely to be prosecuted. A decision to carve-out is not a decision to indict, but the Yates Memorandum's renewed emphasis on individual accountability makes it more probable that carved-out executives ultimately will be indicted.[156]

VII. ETHICAL ISSUES IN CARTEL ENFORCEMENT

Finally, many of the same post-Yates Memorandum ethical considerations applicable in other kinds of cases have specific application in the context of cartel enforcement. For example, company counsel may need to provide more robust *Upjohn* warnings[157] — especially for culpable employees who face the risk of termination or demotion during investigations pursuant to Antitrust Division expectations[158] — and executives are likely to seek the retention of separate counsel earlier in the investigative process. Requests for separate counsel are rising in part because the Yates Memorandum's focus on individual culpability makes it increasingly likely that the interests of a company and its employees will diverge during an incipient stage of the investigation. One key aspect of this divergence is the DOJ's post-Yates Memorandum tendency to request that companies not share information with counsel for their employee-witnesses during an investigation. Pre-Yates Memorandum such requests were rare and typically narrowly tailored to meet a law enforcement objective such as preventing obstruction of justice.[159] Now such requests are more frequent.[160] Requests for separate counsel also may multiply as companies submit leniency applications, which require the disclosure of all known relevant facts about the individuals responsible for the underlying cartel conduct. Most of these individuals who become targets of subsequent DOJ investigations will

155 *See id.*

156 Cooper et al., *supra* note 75.

157 *See* Mark, *supra* note 9, at 1614-16.

158 *See* Seebald & Schnapp, *supra* note 45, at 9.

159 William F. Johnson, *Analyzing Early Returns on the Yates Memo*, N.Y. L.J. (Mar. 3, 2016, 2:00 AM), http://www.newyorklawjournal.com/id=1202751162691/Analyzing-Early-Returns-on-the-Yates-Memo.

160 *Id.*

seek to retain separate counsel and pursue independent negotiations with the government.[161] In turn, this may impede on-going internal investigations. In this situation compliance with the Yates Memorandum will have the unintended effect of frustrating corporations' efforts to uncover and disclose additional evidence of collusive behavior to the Division.[162]

CONCLUSION

Overall, the Yates Memorandum is likely to enhance the DOJ's ability to aggressively pursue anti-cartel enforcement, subject to some caveats. The Memorandum is unlikely to significantly change the Leniency Program, which is a cornerstone of the Antitrust Division's enforcement arsenal. The Memorandum and the revised USAM prohibit corporate resolutions from immunizing individuals or dismissing charges against them (absent extraordinary circumstances), but this prohibition does not pertain to applications submitted under the Program. In other respects, however, the Yates Memorandum may have major consequences. First, companies under investigation likely will be required to disclose more information, perhaps significantly more information, about their own culpable executives in order to obtain cooperation credit. Second, foreign executives are increasingly likely to face antitrust charges in the United States, although this trend will be constrained by obstacles inherent in the extradition process. Third, executives will confront an elevated risk of civil liability. Fourth, the Yates Memorandum may impact the Division's carve-out decisions. Fifth, many of the same ethical considerations that have arisen in the aftermath of the Yates Memorandum and that are applicable to other kinds of cases have specific application in the context of cartel enforcement. These may include the advisability of providing more robust *Upjohn* warnings and separate counsel.

[161] Brass et al., *supra* note 58, pt. I(B)(a)(ii).

[162] *Id.*