

CRIMINAL ANTITRUST ENFORCEMENT: RESTRICTIVE AGREEMENTS, COLLUSION & CARTELS



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REMEMBER

Practices which work well in the U.S. may or may not work well in the legal context of another jurisdiction.

An Introduction

COLLUSION & CARTELS

Collusion is
“the supreme evil
of antitrust. . .”

Justice Antonin Scalia in *Verizon
Communications Inc. v. Law Offices of
Curtis V. Trinko*, 540 U.S. 398, 408 (2004)



WHY ANTITRUST LAWS MATTER: THE IMPORTANCE OF COMPETITION

- **The cost of collusion:**
 - Competitors want to limit competition to make more money
 - The result is that victims are overcharged and defrauded
- **The benefits of competition:**
 - Sellers cut prices
 - Sellers make higher quality products or offer higher quality services
- **Anti-competitive behavior by firms participating in the government procurement process causes a direct loss to agencies that is often passed on to taxpayers**

CRIMINAL VS. CIVIL IN THE U.S.

Criminal:

- **Price-fixing**
- **Bid-rigging**
- **Allocation agreements (markets, customers, sales volumes, output restrictions)**

Civil

- Mergers/joint ventures
- Monopolization/abuse of dominance, other unilateral conduct
- Other anti-competitive conduct or agreements: group boycotts, vertical restraints, etc.

PREVENTING CARTELS

- **Prevention of cartels is the most fundamental responsibility of antitrust enforcers.**
- **It is also one of the most difficult, because cartels almost always try to hide their actions.**

WHAT IS CRIMINAL CARTEL ACTIVITY?

- **Agreement**
- **Between two or more competitors**
- **To restrict or eliminate competition among themselves through per se illegal activity**

CARTEL CONDUCT

- **Unambiguously harmful joint conduct**
 - Unlike joint ventures, joint research agreements, or distribution agreements that may involve legitimate integration and may create offsetting benefits
 - Raise prices or restrict output without any plausible benefits to consumers, & inhibit innovation & efficiency
 - Cartel agreements not only harm customers but also national economy by reducing output, undermining competitiveness of business purchasers, and distorting best allocation of resources
- **Cartel agreements are generally carried out in secret**
 - Customers are defrauded while cartel members hold themselves out as competitors

CARTELS DEEMED PER SE ILLEGAL

- **No argument can justify a cartel agreement**
 - Defendants cannot offer evidence of alleged reasonableness or necessity of cartel conduct
- **No market power needed**
- **No proof of harm is required. Harm is presumed because cartel agreements raise prices and never provide significant benefits to consumers.**

Definitions, Red Flags, and Indicators

THE THREE TYPES OF CARTEL AGREEMENTS

THREE CRIMINAL ANTITRUST OFFENSES

- **Price Fixing**
- **Bid Rigging**
- **Market Allocation**

PRICE FIXING

What is it?

An agreement:

- To raise, lower, or maintain prices
- Not to negotiate on price
- To limit discounts, rebates, or promotions
- On price formulas, price sheets, or guidelines

PRICE FIXING: AN EXAMPLE

- A: “Will you agree to raise your price for salted peanuts to \$1.99 a pound?”
- B: “Yes. Let’s raise the price at noon tomorrow.”



BID RIGGING

What is it?

An agreement:

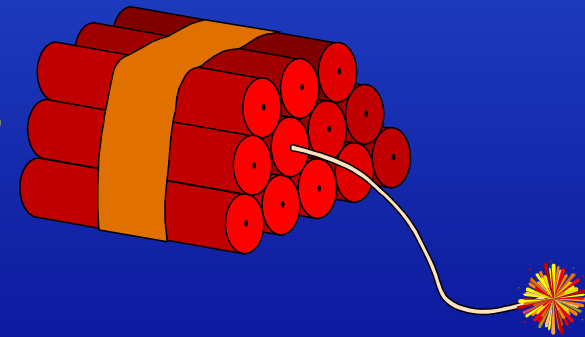
- Bid Rotation
- Bid Suppression
- Complementary Bid

BID RIGGING: AN EXAMPLE

A: “I’d like to win the bid to demolish the Water Street Bridge. If I get the job for \$850,000, I can make some good money. Can you submit a comp bid?”

B: “Sure. I’ll come in at \$900,000 if you’ll let me have the next one.”

A: “Okay. I’ll plan on it.”



ALLOCATION SCHEMES

What are they?

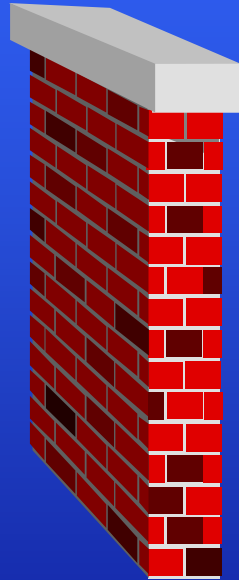
An agreement:

Not to compete for specific:

- Territories
- Customers
- Products
- Volume

ALLOCATION SCHEMES: AN EXAMPLE

- A: “We’re beating each other up, B. I’ll agree to stay out of the masonry jobs in Jonesville if you agree to let me have Smithville.”



B: “Sounds good. I’ll take Jonesville and you can have all the business in Smithville.”

How Detection Leads to Deterrence

DETECTION & DETERRENCE

WHERE ARE CARTELS OPERATING?

- **EVERYWHERE**
- **Our investigations have uncovered meetings of international cartels in well over 100 cities in more than 35 countries**

PRODUCTS AND SERVICES FREQUENTLY SUBJECT TO COLLUSION

- **Our investigations have uncovered meetings of international cartels in well over 100 cities in more than 35 countries**
- **Bread**
- **Milk**
- **Construction**
- **Road Building**
- **Concrete/Cement**
- **Trash Hauling/Waste/Scrap Metal**
- **Government Contracts**

IMPORTANCE OF DETECTION

- **Credible threat of detection essential to deterrence**
- **Without detection**
 - No investigation
 - No prosecution
 - No punishment

THE EXECUTIVE'S DECISION TO ENTER A CARTEL AGREEMENT

- Premeditated decision
- Classic cost-benefit analysis
- Executive weighs the:

Rewards:

- Money
- Market share



Risks:

- Getting caught
(Detection)
- Punishment
(Sanctions)

DETERRENCE: MAKE THE EXECUTIVE DECIDE NOT TO ENTER CARTEL AGREEMENT

- Reduce the Rewards
- Increase the Risks

DETERRENCE

- **How DOJ has sought to maximize deterrence:**
 - Adopting a policy of criminal prosecution of hard-core cartel activity that affects U.S. consumers & businesses
 - Devoting significant resources to the investigation and prosecution of those activities
 - Prosecuting individual participants & corporate offenders
 - Seeking heavy fines on corporate offenders and actual jail time on individuals acting on their behalf

The Challenge of Detection

DETECTION & DETERRENCE

CHALLENGE OF DETECTION

- **Cartels not easily observed**
- **Victims don't know**
- **Cartels keep secret**
 - Deny existence
 - Don't operate in public
 - Hide behind trade associations
 - Communicate in code

CHALLENGE OF DETECTION

- **Problem:**
 - Cartelized markets often don't look that much different than competitive markets
- **Can Pricing Information Reveal Cartel?**

EXAMPLE: GAS STATIONS



Characteristics of Cartels

DETECTION & DETERRENCE

CONDITIONS FAVORABLE TO COLLUSION

- **Few sellers or buyers**
- **No readily available substitutes**
- **Standardized product—commodities**
- **Vendors repeatedly sell to same buyers**
- **Competitors have frequent contact**

MANY TYPES OF CARTELS

- **Buyers/Sellers**
- **Goods/Services**
- **Raw Materials/Intermediate Products/Finished Goods**
- **Local/Regional/National/International**
- **Many Firms/Few Firms**

INDUSTRIES

- **Construction**
- **Steel**
- **Chemicals**
- **Legal services**
- **Forest products**
- **Real estate auctions**
- **Airlines**
- **Railroads**
- **Military purchasing**
- **Sugar refining**
- **Poultry processing**
- **Port services**
- **Food additives**
- **Pharmacies**
- **Art auction services**

CHARACTERISTICS OF INTERNATIONAL CARTELS

- Senior Executives
- Global – Volumes?
- Pricing
- Efforts to Conceal
- Fear of Detection

RECURRING CHARACTERISTICS OF INTERNATIONAL CARTELS

- Trade Associations
- Audits/Score Sheets
- Policing the Agreement
- Compensation Schemes
- Budget Meetings

Indicators & Red Flags

DETECTION & DETERRENCE

PRICE FIXING: THE INDICATORS

- ❏ **Competitors: similar conduct**
- ❏ **Competitors: comments**
- ❏ **Where the bidders sit**
- ❏ **Similar wording or errors**

BID RIGGING: THE INDICATORS

- ❏ **Rotation**
- ❏ **Same winner**
- ❏ **Subcontracts**
- ❏ **Bid Increases**
- ❏ **Similarities**

WHAT BID RIGGING LOOKS LIKE

Competitor Interactions

- ✓ Fewer than normal number submitting bids
- ✓ Qualified bidders do not bid
- ✓ Competitors meet or socialize before bids

Patterns in Amounts of Bids

- ✓ Identical bids or identical increments between bids
- ✓ Unusually high bids or bids with no relation to cost

Physical Similarities/Alterations

- ✓ Same handwriting or font
- ✓ Same typos or mathematical errors
- ✓ White out

SIMILARITIES IN BID PROPOSALS

Look for:

- Similar handwriting, typeface, stationery, email address
- Last-minute changes – white-outs, physical alterations to prices
- Vendor picks up an extra bid package for another vendor
OR submits a competing vendor's bid

ALLOCATION SCHEMES: THE INDICATORS

- ❏ Competitors suddenly stop selling in a territory
- ❏ Competitors suddenly stop selling to a customer
- ❏ Competitor refers customers to other competitors

WHAT MARKET ALLOCATION SOUNDS LIKE

“We can’t sell to you”

“You aren’t in our area”

“We don’t sell in that area – you will need to call Company X”

“Company Y should not be calling you for that product”

SUSPICIOUS PATTERNS

- Vendors take turns as the winning bidder
- Winner subcontracts out work to losing bidders
- It all evens out
- The same guy always wins—or loses
- Unusually high bids from all bidders
- Fewer than normal number of bidders

COORDINATED PRICE INCREASES

- **Coordinated price increases should arouse suspicion**
- **But what drives a price increase?**
 - Increased costs?
 - Increased demand?
 - Formation of cartel?
- **Similar pricing? May be collusion or competition**

SUSPICIOUS BEHAVIOR

- **No-Chance Bidder**
- **Betting Bidder**
- **Loud-Mouth Bidder**

Sources of Cases

DETECTION & DETERRENCE

ENFORCERS FIGHTING CARTELS

- **Cartels Are Inherently Difficult To Prove**
 - Helps to have an insider willing to cooperate
- **Cartels Involve Multiple Actors**

ANTITRUST IN THE DIGITAL AGE

- **Same basic fraudulent conduct**
 - E-commerce: Recent case regarding agreement to fix prices using pricing algorithms
- **Electronic Evidence**
- **Social Media**

SOURCES OF CASES

- **Complainants not involved in cartel – Citizen Complaints**
 - Disgruntled employees
 - Customers & citizens
 - Complaint line/website
 - Competitors
- **Agency Referrals – Procurement Officials**
- **Referral from Law Enforcement**
- **Industry rumours**
- **Leniency applicants and cooperators**

CARTEL INSTABILITY

Inherently unstable due to the problems they face:

- **Getting members.**
 - To be effective, cartels often need all or most of the relevant firms to participate.
 - But competitive fringe
- **Agreeing on terms: e.g. price, allocation of market shares**
- **Temptations to cheat**
- **Policing cheating & monitoring compliance**

Good News: These problems create evidence of the cartel's existence

Leniency Programs

DETECTION & DETERRENCE

CORPORATE LENIENCY PROGRAM

- **Corporations: no criminal charges**
- **Open to one corporation per conspiracy**
- **Two types**
- **No treble damages, no joint & several liability in civil cases**
- **Leniency Plus**

For more information, see <http://www.justice.gov/atr/public/criminal/leniency.html>

SIGNIFICANCE OF LENIENCY POLICY

- **Most important investigative tool for criminal antitrust violations ever developed**
- **Best source for detection of cartels**
- **Destabilizes cartels; creates race to prosecutor**
- **Cooperation of insiders**
- **Access to documents and witnesses regardless of location**
- **Jurisdictions worldwide have followed U.S. lead**

BENEFITS TO ENFORCERS

- **Company admits conduct before investigation is opened or turn on others after investigation underway**
- **Provide critical cooperation of inside participants**
- **Access to documents regardless of location**
- **Access to witnesses regardless of nationality**
- **May provide opportunity for covert operations**

FEATURES OF AN EFFECTIVE PROGRAM

- **Significant Sanctions**
- **Fear of Detection**
- **Transparent/Predictable Policies**
- **Dedication to Enforcement**

CERTAINTY

- **Companies must be able to predict how they will be treated for reporting wrongdoing**
- **Leniency policy available on DOJ website**
 - Clearly defined
 - Obligations explained
 - FAQs answered
 - Model documents and examples

CONFIDENTIALITY

- **Hold identity of, and information provided by, leniency applicants in strict confidence**
- **Division does not publicly disclose the identity of, or information provided by, the applicant unless:**
 - prior public disclosure by applicant;
 - prior agreement with the applicant; or
 - required to do so by court order in connection with litigation
- **Leniency applicants typically will waive confidentiality for communications with other jurisdictions**

HIGH RISK OF DETECTION

- **Agencies can develop a reputation from investigating regional and local conduct**
 - Public procurement cases
- **Create an expectation that agencies will hold people and companies accountable for breaking the law**

Real Case Examples

IDENTIFYING BID RIGGING & MARKET ALLOCATION

Real Case Examples

*UNITED STATES V. RIVERA-HERRERRA
ET. AL* (DISTRICT OF PUERTO RICO,
2015)

UNITED STATES V. RIVERA-HERRERRA ET. AL

- Town awarded school bus contracts via auction.
- Four school bus company owners and others agreed to allocate school bus contracts. They predetermined the winning bidders. The losing companies agreed not to bid or submitted inflated “complementary” bids to create the appearance of competition.
 - The conspirators agreed to raise the prices of their bids.
- After an investigation and trial, the four school bus company owners were convicted of bid rigging and market allocation, conspiracy to commit mail fraud, and multiple counts of mail fraud.

UNITED STATES V. RIVERA-HERRERRA ET. AL

- **The Indicators:**

- Some bids are much higher than prevailing market prices, previous bids by the same firms, or other independent cost estimates.
- The company appears to be bidding substantially higher on some bids than on other bids, with no apparent cost differences to account for the disparity.
- The bidder submitted a bid when it is incapable of successfully performing the contract.
- The bidder made a statement that a bid was a courtesy, complementary, token or cover bid.

- **The Concern:**

- Bidders are submitting complementary bids, which are designed to lose.
- Complementary bids give the false appearance of competition.

Real Case Examples

UNITED STATES V. MARSHAK
(DISTRICT OF CONNECTICUT, 2016)

UNITED STATES V. MARSHAK

- U.S. Foreign Military Funding Program (“FMF”) finances foreign governments’ purchase of military equipment and services from vendors in the U.S.
- FMF Guidelines highly recommend competitive bidding to choose a U.S. vendor, though exceptions can be justified.
- The bidding process to find U.S. subcontractors to provide parts for an Israeli commissioned military equipment contract was compromised.
- Fraudulent scheme executed by Israeli executive at civilian procuring company, who was paid a (disguised) commission by the winning bidders.

UNITED STATES V. MARSHAK

- **The Indicators:**

- The bidder made any reference to industry-wide or association price schedules.
- The bidder made statements indicating that vendors have discussed prices among themselves or have reached an understanding about prices.
- The bidder made statements indicating advance (non-public) knowledge of competitors pricing.

- **The Concern:**

- Competitors agreed to fix prices.
- Failed to make independent bidding decisions.

UNITED STATES V. MARSHAK

- **The Indicators:**

- A successful bidder subcontracts work to competitors that submitted unsuccessful bids on the same project.
- A company withdraws its successful bid and subsequently is subcontracted work by the new winning contractor.

- **The Concern:**

- Rather than competing for the work, the bidders decide to forego competition and divide up the work amongst themselves.

Real Case Examples

***UNITED STATES V. WASHINGTON GAS
ENERGY SYSTEMS, INC. AND RELATED
CASES
(DISTRICT OF D.C., 2014)***

UNITED STATES V. WASHINGTON GAS ENERGY SYSTEMS, INC.

- Two conspiracies to commit fraud on the U.S. by obtaining contracts meant for small, disadvantaged businesses.
- Small, disadvantaged businesses submitted bids for the contracts, and subcontracted all of the work to ineligible companies in exchange for approx. 3%-6% of the value of the contract.
- The two illegal schemes involved 35 government contracts worth over \$80 million.

UNITED STATES V. WASHINGTON GAS ENERGY SYSTEMS, INC.

- **The Indicators:**

- There are irregularities (such as identical calculations or spelling errors) or similar handwriting, typeface, or stationary in the proposals or bid forms submitted by different vendors (indicated that the designated low bidder may have prepared some or all of the losing bids).

- **The Concern:**

- That the winning bidder facilitated a complementary bidding process by preparing all bids.

QUESTIONS?

