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Amnesty and Its Punishments: ACPERA and the Future of U.S. Antitrust Cartel Enforcement

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Introduction

There is a tension at the heart of modern U.S. cartel enforcement. On one hand is the engine that has been driving most criminal and civil cartel enforcement since the mid-1990s — the Department of Justice’s corporate leniency or “amnesty” program.¹ The modern leniency program offers a relatively² simple bargain to the first intrepid cartel member who walks through DOJ’s door: complete criminal amnesty in exchange for complete cooperation.³ But the simplicity of this bargain historically has been complicated by the significant countervailing likelihood of private “follow-on” lawsuits threatening some of the most severe penalties found anywhere in the U.S. legal system, including joint and several liability, treble damages, and the automatic recovery of attorneys’ fees and costs. By providing the government with the robust cooperation necessary to achieve criminal amnesty, typically a cartel member was also ensuring private plaintiffs would have the evidence they needed to successfully obtain these civil penalties, which, at least for corporate defendants, can be more financially painful than anything the criminal process can conjure. The result is that the cost-benefit analysis of invoking the DOJ’s amnesty program has not always been as straightforward as it appears or was likely intended.

Enter ACPERA. Sixteen years ago, the U.S. Congress expressed concern that the prospect of expansive, unmitigated civil liability was deterring potential amnesty applicants from cooperating with the government, and thereby weakening the entire U.S. scheme of cartel enforcement.⁴ To address the issue, Congress passed the Antitrust Criminal Penalties Enhancement Reform Act of 2004 (“ACPERA”)⁵, which attempted to shift the cost-benefit analysis back in favor of criminal cooperation by potentially sparing successful amnesty applicants the joint and several liability and treble damages typically available in civil antitrust conspiracy cases, *i.e.*, limiting the applicant’s civil liability to the actual damages attributable to its own sales. But the benefits of this enhanced bargain are not automatic and come with a big catch: in addition to satisfying all the ongoing requirements of the DOJ’s amnesty program, the applicant must also provide civil plaintiffs with “timely” and “satisfactory cooperation” — cooperation arguably meant to exceed what was provided to achieve criminal amnesty.

ACPERA has been controversial since its inception. Some have argued that the benefits of criminal amnesty are enough to motivate participation in the amnesty program, particularly when a potential applicant knows that if it does not act quickly, one of its co-conspirators may win the race to the DOJ’s door. Others have argued that while reduced civil liability under ACPERA is a meaningful additional incentive, the imposition of vague cooperation requirements nonetheless undermines it by making it unclear whether reduced liability actually will be achieved, including by incentivizing private plaintiffs to paint the applicant’s cooperation as “untimely” or “unsatisfactory” as leverage to extract monetary settlements nearly as punitive as in a world where ACPERA did not exist at all.⁵

This debate is growing louder as Congress once again confronts ACPERA's future. ACPERA was enacted in 2004 with a five-year "sunset provision," and was then renewed in 2010 for another ten years. It is now up for renewal again, and there are serious questions about whether Congress will, or should, allow the statute to persist in its current form — or at all. This debate is happening against a complex backdrop, in which participation in DOJ's amnesty program is at an all-time low, while the reach, power, and activity of many foreign antitrust leniency and enforcement programs continue to increase. The result of this debate will help determine the future of antitrust cartel enforcement in the United States, and it is not one that any company doing business in this country can safely ignore.

ACPERA's Uncertain Cooperation Standards

Many commenters, including at least one former DOJ official, have voiced concern that ACPERA's vague cooperation standards may defeat the statute's "core purpose" of encouraging those antitrust violators for whom criminal amnesty alone is an insufficient incentive to apply for amnesty.⁷ Unlike the leniency program itself, ACPERA's cooperation scheme provides a prospective amnesty applicant with no guarantees. Not only does the statute fail to define what will ultimately constitute "timely" and "satisfactory" cooperation in a particular case, it also leaves these questions unanswered in any particular case until the trial court makes that determination at the time of judgment.

In large part for this reason, the existing case law does not provide tremendous insight. Because the vast majority of antitrust cases terminate in a pre-judgment settlement, it is relatively rare for ACPERA issues even to be presented to a judge for resolution. Indeed, prior to the statute's renewal in 2010, there were only two cases on the books squarely addressing the application of ACPERA (and even in those cases, it can be debated how "squarely" that issue was resolved).

In *In re Municipal Derivatives Antitrust Litigation*,⁸ the amnesty applicant and certain named plaintiffs entered into a pre-complaint ACPERA agreement, which other named plaintiffs argued constituted a conflict because it waived their right to obtain treble damages from the amnesty applicant.⁹ The court disagreed, holding that ACPERA specifically licensed such an arrangement, finding that the plaintiffs retained their ability to seek treble damages and impose joint and several liability on all other defendants.¹⁰

Likewise, in *In re Sulfuric Acid Antitrust Litig.*,¹¹ after the parties entered into an ACPERA agreement requiring "satisfactory cooperation," plaintiffs brought a motion to compel the applicant to provide certain forms of discovery, arguing that the applicant's refusal to make two of its employees available for deposition was a violation of their ACPERA agreement. The court held that the agreement's requirement that the applicant make witnesses available for deposition upon "reasonable notice," which it noted simply tracked the statutory language,¹² did not mean it was required "to be at the plaintiffs' beck and call" and therefore the applicant was not precluded "from claiming that the notices of deposition were untimely and unreasonable."¹³

At the time of its renewal in 2010, some proponents of ACPERA argued that this paucity of

case law was reason enough to reauthorize the program until the courts had more opportunity to provide guidance to future litigants. But nearly a decade later, the body of case law addressing ACPERA's cooperation standards has made little further progress.

In one of the few cases decided during this period, *In re Aftermarket Auto. Lighting Prods. Antitrust Litig.* (“Auto Lights”), the court addressed plaintiffs’ motion requesting a determination that defendants were not entitled to limited damages under ACPERA’s civil cooperation provisions.¹⁴ Defendants countered that they had provided timely and satisfactory compliance in the form of nine attorney proffers, production of thousands of pages of documents (which included translations at defendants’ expense), offered multiple witnesses for interview, secured potential witnesses with no ties to the United States so as to avoid jurisdiction issues, and produced seven witnesses for deposition.¹⁵ The court disagreed, finding defendants had failed to proffer information that showed the underlying conspiracy began years before previously thought.¹⁶ Crucially, plaintiffs did not come by this information until after the time to amend their complaint.¹⁷ The court, in noting ACPERA requires cooperation beyond what is required by the discovery obligations found in the federal rules,¹⁸ held defendants had failed to meet the standard of satisfactory cooperation and therefore were not entitled to the damages-limiting benefits of ACPERA.¹⁹

The court went on to find defendants’ claim that they could not verify when the conduct began to be irrelevant, as ACPERA’s standard required they provide a “‘full account’ of facts *potentially* relevant to the conspiracy,” and this information clearly fit that description.²⁰ Moreover, defendants had disclosed this exact information to the DOJ, a fact the court felt demonstrated the information’s relevancy.²¹

This sparsity of case law — now stretching nearly two decades — suggests that the long-awaited critical mass of judicial decisions giving content to ACPERA’s vague cooperation requirements may never arrive. If that is right, then the only remaining avenue for bringing clarity to ACPERA’s cooperation scheme is a statutory amendment by Congress.

Are Changes to ACPERA In Store?

With ACPERA’s 2010 reauthorization, Congress commissioned the U.S. Government Accountability Office to conduct a study and issue a report analyzing ACPERA’s purported effectiveness in deterring and detecting anticompetitive conduct.²² As part of this study, the GAO reviewed court dockets and case filings, as well as interviewed a diverse subset of antitrust practitioners and academics. The resulting seventy-page report concluded that ACPERA had little evident impact on deterring cartel behavior, with a minimal change in the number of amnesty applications filed in the years following ACPERA’s enactment.²³ Even the most celebrated positive — a slight uptick in so-called “Type A” leniency applications²⁴ — was attributed by most interviewees to an increase in potential criminal sentences and fines²⁵ and greater activity by foreign antitrust leniency programs, rather than to the reduced civil liability made (theoretically) available under ACPERA.²⁶ By contrast, the most vocal supporters of ACPERA at this time were among the private plaintiffs’ bar, who argued that, independent of its effects on incentivizing criminal amnesty applications (the statute’s founding purpose), ACPERA plays an integral role in aiding just results in private antitrust litigation. Even so,

both plaintiff and defense lawyers reported confusion about when cooperation was to begin and end, as well as what level of cooperation would be considered satisfactory.²⁷

In recognition of these problems, in April 2019 the Division conducted a public roundtable to discuss the effectiveness of ACPERA's incentive structure.²⁸ This time, each of the public comments agreed that the vague "satisfactory cooperation" standard presented significant hurdles to effectively achieving cartel detection.²⁹ Participants proposed widely varying material changes to the statute, ranging from entirely eliminating civil follow-on litigation in favor of criminal restitution as the sole means of redressing victims of antitrust conspiracies, to expediting the resolution of the "satisfactory cooperation" issue, such that it is decided before the determination of the defendant's pre-discovery motion to dismiss the case.³⁰

But these comments did not address a potentially far simpler solution that stops well short of eliminating private antitrust conspiracy cases entirely, while also eliminating the prevailing "cooperation confusion" under ACPERA — namely, simply excising ACPERA's "satisfactory cooperation" requirement altogether. Under such a scheme, an applicant who fulfills all of the requirements of DOJ's amnesty program — including robust and unprecedented cooperation — *automatically* receives *both* criminal amnesty and reduced civil liability (no treble damages or joint and several liability). Provided that all of the cooperation provided to the DOJ is ultimately provided to private plaintiffs (and indeed, copies of complete productions to DOJ often are document request No. 1), there is no further, amorphous "cooperation" requirement for the applicant to worry about. The applicant's cost-benefit analysis in deciding whether to apply for amnesty becomes crystal clear. For those who believe ACPERA's uncertainty has been deterring amnesty applicants, there is no question that this approach would summarily resolve the problem.

The primary objection to this approach is that it allows amnesty applicants — who, after all, are admitted antitrust violators — to unfairly get something for nothing: reduced civil liability with no additional cooperation obligations at all. One response is that, from an institutional perspective, incentivizing greater participation in DOJ's amnesty program *necessarily* confers additional benefits on private plaintiffs in follow-on lawsuits, because the robust cooperation obtained by the DOJ is handed in turn to the private plaintiffs, where it very often provides the evidentiary backbone of their entire case. It could be argued, then, that private plaintiffs who oppose eliminating ACPERA's separate cooperation requirement are cutting off their noses to spite their faces. By insisting on additional "cooperation" these plaintiffs may be deterring amnesty applications, which are often a necessary prerequisite for private plaintiffs to obtain the evidence they need to even get their cases off the ground.

Further, eliminating ACPERA's separate cooperation requirement would not let antitrust violators off the hook. Instead, such applicants would remain fully liable for all damages caused by their own conduct, and private plaintiffs could still seek to recover three times the damages caused by the entire conspiracy on a joint and several basis from other defendants. Plaintiffs thus would not only still receive the information needed to effectively litigate their claims but would also continue to recover damages well beyond what they in fact suffered.

Conclusion

If the authors of this article had to hazard a guess as to what will happen to ACPERA in the immediate future, it is this: nothing. In addition to support from major U.S. antitrust institutions like the Antitrust Section of the American Bar Association and the American Antitrust Institute,³¹ the DOJ's Assistant Attorney General Makan Delrahim recently testified before Congress and urged permanent reauthorization of ACPERA with no changes to the existing "satisfactory cooperation" scheme.³² If these prominent voices prevail, businesses considering an amnesty application in the United States will have to continue navigating the same difficult cost-benefit analysis they have for the last sixteen years. For those who believe changes to ACPERA are essential to enhancing the performance of DOJ's leniency program in the coming decades, however, the debate remains open, and this may be their last best chance to effect those changes before the statute is authorized permanently.

References

¹ Scott D. Hammond, "The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades," address before the National Institute on White Collar Crime (Feb. 25, 2010); *see also* "Criminal Enforcement of U.S. Laws: The U.S. Model," address given by Asst. Attorney General Thomas O. Barnett (September 14, 2006) (available online at <http://www.usdoj.gov/atr/public/speeches/218336.htm>) ("Amnesty programs are invaluable in detecting cartels and in collecting the evidence necessary to obtain a conviction. It is notoriously difficult to discover cartel behavior or, once discovered, to compile sufficient evidence to successfully prosecute cartel members in court. To penetrate the elaborate concealment strategies cartels use, prosecutors must have a tool to convert cartel members into cooperative witnesses, so that prosecutors can gain access to background information, testimony, and the documents that otherwise might be destroyed. Amnesty programs are such a tool.").

² The terms of the amnesty program have expanded in the last several years to include a greater focus on compliance, in addition to cooperation. *See generally* Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters, Dep't of Justice: Antitrust, *available at* <https://www.justice.gov/atr/page/file/926521/download>.

³ Technically, this form of "Type A" amnesty requires the cartel member to provide its cooperation "before the Division has received any information about the activity being reported from any source." *See id.*

⁴ 150 Cong. Rec. S3610-02 (April 2, 2004) at *S3614.

⁵ P.L. No. 108-237, § 201 *et seq.* (2004) ("ACPERA").

⁶ Mike Scarborough & Dylan Ballard, "The Case For Eliminating ACPERA's Supplemental Cooperation Requirement For Amnesty Applicants," *Competition: The Journal of the Antitrust and Unfair Competition Law Section of the State Bar of California*, Vol. 20, No. 2, Fall 2011.

⁷ *See, e.g.,* Tom Madge-Wyld, "US DOJ has shaken confidence in its own leniency programme, former official says," *GCR* (Mar. 27, 2019), *available at* <https://globalcompetitionreview.com/article/1189310/usdoj-has-shaken-confidence-in-its-own-le>

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⁸ 252 F.R.D. 184 (S.D.N.Y. 2008).

⁹ *Id.* at 187.

¹⁰ *Id.*

¹¹ 231 F.R.D. 320 (N.D. Ill. 2005).

¹² *Id.* at 329, n. 13.

¹³ *Id.* at 329.

¹⁴ 09 MDL 2007-GW (PjWx), 2013 U.S. Dist. LEXIS 125287 (C.D. Cal. Aug. 26, 2013).

¹⁵ *Id.* at *4-5.

¹⁶ *Id.* at *12.

¹⁷ *Id.* at *16.

¹⁸ *Id.* at *11-12.

¹⁹ *Id.* at *17-18.

²⁰ *Id.* at *14 (emphasis in the original).

²¹ *Id.* at *13-14.

²² U.S. Gov't Accountability Office, "Report To Congressional Committees, Criminal Cartel Enforcement, Stakeholder Views On Impact Of 2004 Antitrust Reform Are Mixed, But Support Whistleblower Protection," (2011), *available at* <https://www.gao.gov/assets/330/321794.pdf> (hereafter "GAO Report").

²³ GAO Report, *supra*, at 15.

²⁴ Type A leniency is granted to an applicant who brings to the Division's attention unlawful conduct that was not yet known.

²⁵ GAO Report, *supra*, at 15-16.

²⁶ *Id.* at 21.

²⁷ *Id.* at 30.

²⁸ Public Roundtable on Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA), US Department of Justice: Antitrust, *available at*

<https://www.justice.gov/atr/events/public-roundtable-antitrust-criminal-penalty-enhancement-reform-act-acpera>.

²⁹ See The American Bar Association, “Comments Of The Antitrust Law Section Of The American Bar Association Regarding The U.S. Justice Department Antitrust Division Roundtable Discussion Of The Antitrust Criminal Penalty Enhancement & Reform Act (Acpera),” April 11, 2019, *available at*

[https://www.justice.gov/atr/page/file/1168676/download#American Bar Association \(ABA\); Roxann Henry, “Antitrust Division of the Department of Justice Roundtable on Antitrust Criminal Penalty Enhancement and Reform Act \(ACPERA\),”](https://www.justice.gov/atr/page/file/1168676/download#American%20Bar%20Association%20(ABA);%20Roxann%20Henry,%20%22Antitrust%20Division%20of%20the%20Department%20of%20Justice%20Roundtable%20on%20Antitrust%20Criminal%20Penalty%20Enhancement%20and%20Reform%20Act%20(ACPERA),%22) *available at*

[https://www.justice.gov/atr/page/file/1168661/download#Henry, Roxann; Committee to Support Antitrust Laws, “Submission by COSAL on the efficacy of the Antitrust Criminal Penalty Enhancement and Reform Act \(ACPERA\),”](https://www.justice.gov/atr/page/file/1168661/download#Henry,%20Roxann;%20Committee%20to%20Support%20Antitrust%20Laws,%20%22Submission%20by%20COSAL%20on%20the%20efficacy%20of%20the%20Antitrust%20Criminal%20Penalty%20Enhancement%20and%20Reform%20Act%20(ACPERA),%22) *available at*

[https://www.justice.gov/atr/page/file/1168671/download#Committee to Support Antitrust Laws \(COSAL\); American Antitrust Institute, Comments of the American Antitrust Institute Prepared for the Antitrust Division Roundtable on the Antitrust Criminal Penalty Enhancement and Reform Act,”](https://www.justice.gov/atr/page/file/1168671/download#Committee%20to%20Support%20Antitrust%20Laws%20(COSAL);%20American%20Antitrust%20Institute,%20Comments%20of%20the%20American%20Antitrust%20Institute%20Prepared%20for%20the%20Antitrust%20Division%20Roundtable%20on%20the%20Antitrust%20Criminal%20Penalty%20Enhancement%20and%20Reform%20Act,%22) *available at* [https://www.justice.gov/atr/page/file/1168666/download#American Antitrust Institute \(AAI\)](https://www.justice.gov/atr/page/file/1168666/download#American%20Antitrust%20Institute%20(AAI)).

³⁰ *See id.*

³¹ ABA Comments, *supra*; AAI Comments, *supra*.

³² Assistant Attorney General Makan Delrahim, “Online Platforms and Market Power, Part 4: Perspectives of the Antitrust Agencies,” *available at*

<https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-testifies-house-judiciary-subcommittee>.