

# AntitrustConnect Blog

## It's Time For A Criminal Antitrust Whistleblower Statute (It Was Time Last Year And The Year Before Too)

Robert E. Connolly (Law Office of Robert Connolly) · Wednesday, August 17th, 2022

The Antitrust Section of the American Bar Association's 14th International Cartel Workshop took place over June 27-29, 2022 in Lisbon, Portugal. By all accounts the conference was a success and well attended. The only thing missing was, um, any international cartel cases to talk about.

There are likely numerous reasons that international cartel cases have seemingly disappeared from the scene. First, let's give credit to good old fashion deterrence. By now, would-be cartelists must know that the odds of getting caught have increased (thanks to international cooperation). Most importantly for executives, the odds of going to jail have increased and, if you're a foreign executive, the odds of having a very unpleasant extradition experience have also increased. Word gets around ("Hey, did you hear who is going to jail?"). Many hopefully, have taken that wise antitrust counsel: KNOCK IT OFF!

But it is unlikely international cartels have been completely eliminated. Effective law enforcement results in another option besides ceasing cartel conduct; *being much more careful about it*. Gone are the days [mostly] of explicit emails setting up cartel meetings, detailed score sheets of everyone's volume and prices and other explicit "delete after reading" emails that are not deleted. This has made detection of cartels more difficult, both for the Antitrust Division and company counsel who may have reason to suspect collusion but perhaps today don't have the "hot documents" binder to deliver to the Antitrust Division. Without solid documentary evidence supporting witness testimony regarding a cartel, the dance between defense counsel and the Antitrust Division for leniency becomes more difficult, very lengthy, possibly contentious and ultimately, in some counsel's view, a risk not worth taking. There's much more that can be said about why leniencies in international cartel cases, and overall, have diminished, but that's not the topic of this article. The plea here is that it is time, and it has been time, to add another powerful weapon to the DOJ's arsenal for deterring, detecting and prosecuting criminal antitrust violations—a criminal antitrust whistleblower statute.

I've written quite a bit about the benefit of a criminal antitrust whistleblower statute. See e.g., [Another Post About Whistleblowers and Criminal Antitrust Enforcement](#), Cartel Capers, February 18, 2021; [Benefits of A Criminal Antitrust Whistleblower Statute](#), Cartel Capers, June 20, 2018; [It's A Crime There Isn't A Criminal Antitrust Whistleblower Statute](#), Robert Connolly and Kimberly Justice, April 5, 2018. I won't restate my arguments except to repeat my favorite quote from Not Crazy Anymore—Crazy Eddie:

In the two decades I was deeply involved in the Crazy Eddie fraud, the only threat made us lose sleep at night was the possibility of a whistleblower blowing the lid on our crimes. Consistent studies by the Association of Certified Fraud Examiners have shown that most frauds are exposed by whistleblowers, far ahead of frauds exposed by any other source. The SEC will be handing a gift to white-collar criminals if it reduces whistleblower bounties. — Sam E. Antar, Former Crazy Eddie CFO, former CPA, and a convicted felon.

<https://www.wsj.com/articles/sec-proposes-whistleblower-awards-for-smaller-cases-1530212390>

Of course, one whistleblower is not going to make a cartel case. But a cartel-insider whistleblower may provide the basis for consensual monitoring, search warrants and other aggressive investigatory tactics that often induce others to come forward. Search warrants/dawn raids are often the catalyst for the old-fashion rush to be first in line for corporate leniency.

The Antitrust Division is a bit of an outlier in trying to detect and prosecute secret fraudulent agreements without the benefit of a whistleblower statute. The SEC, IRS and CFTC all have whistleblower rewards programs which have become hugely successful. Each of these programs is open to and have benefitted from non-US citizen whistleblowers. International cartels typically have many “potential” whistleblowers, from the most senior executives down to regional managers. Or, to use the language of some cartels “top guys” and “working level” conspirators. Perhaps there could be a whistleblower in this large pool?

Senator Amy Klobuchar has already proposed criminal antitrust whistleblower legislation. ([here](#))

(b) Whistleblower Reward.—The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 is amended by inserting after section 216 the following:

**“SEC. 217.CRIMINAL ANTITRUST WHISTLEBLOWER INCENTIVES.**

This proposed legislation is a part of a much more expansive package entitled **S.225 – Competition and Antitrust Law Enforcement Reform Act of 2021** which deals with many contentious issues such as merger reform, burdens of proof, market definition, etc. The criminal whistleblower piece of the legislation will never see the light of day unless it is broken out and pushed as a stand-alone bill. As such, it may receive strong bipartisan support. Criminal antitrust enforcement has generally had bipartisan backing and the international cartel lobby is non-existent.

The Senate is currently considering the American Innovation and Choice Online Act that “would bar the companies [Big Tech] from prioritizing their own services over those of their rivals.” See, N.Y. Times, **Clock Running Out on Antitrust Bill Targeting Big Tech**—A sweeping bill that would enact the strongest restrictions on Big Tech companies in the United States has been stalled in the Senate, by David McCabe and Stephanie Lai, August 5, 2022. Whatever the fate of this controversial bill, perhaps the criminal antitrust whistleblower statute could be low hanging fruit that all parties can get behind to add another important cartel busting tool to the Antitrust Division’s arsenal. The revised leniency program revolutionized criminal antitrust enforcement in 1993. Could a criminal antitrust whistleblower statute do the same? Let’s find out, please.

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[Bob Connolly](#) bob@reconnollylaw.com

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