

***The Informant!* (2009, S. Soderbergh director)**

Imelda Maher, UCD, 2016

I thought this was a film about the famous lysine cartel. And it is at the start. But then it draws closer to its title and becomes a film about the Walter Mitty protagonist, Mark Whitacre and how he was treated by the justice system when the investigation of the cartel went public.

The cartel involved five firms (ADM, two Korean and two Japanese). Andreas and Wilson, two ADM executives, were found guilty and received 33 months (increased from 24 months on appeal (US v. Andreas 216 F 3d 645 (7th Circ. 2000))). Both were fined \$350,000 personally. Whitacre, the whistleblower, was also convicted and given a 2 month sentence on top of the 9 years he got for embezzlement. A fourth, a Japanese executive was on the indictment but was a fugitive and was not tried. Amazingly, Whitacre received a longer sentence than the others at first instance. The sentences were substantially more than was the norm for antitrust offences at the time. ADM had also paid the largest ever fine for that time: \$100 million. It paid out CND\$16 million in Canada also. The Japanese firms paid out \$2.5m and \$47,000. The European Commission fined ADM \$45 million. Class actions brought in the US also led to settlements by ADM whereby it paid out more than \$250 million in fines and civil settlements (these were for the lysine cartel and also for its role in the citrus cartel) (First, 2001). Since the 1990s it has disappeared from the antitrust radar.

Despite energizing the prosecution of multi-million dollar cartels by the Department of Justice, Whitacre lost his immunity because of his embezzlement actions - of which ADM had been aware for several years - and in fact served for longer in prison than the leaders of cartel. Dwayne Andreas had immunity from prosecution when the cartel was exposed because he cooperated under the leniency programme. He is one of the biggest contributors to politicians in the US and was so influential he brokered a meeting between Reagan and Gorbachev in 1985.

The film highlights the challenges of proving white collar crime are considerable.

There also seems to be an abuse of power here: by ADM, by the state (in its treatment of the extremely vulnerable Whitacre) and by Whitacre – who grew delusional but seemed to enjoy the process at times.

What did the law not 'see' here? It seemed blind to the severe mental health problems of the informant and their likely impact on his behavior. It also raises interesting questions about duty of care for the informant and whether it was met by the FBI here. The suggestion is that it clearly was not. Law enforcement targeted Whitacre. Is this an indictment of how society views whistleblowers and informants?

Justice depends on the lawyer, not the law. This is clear to the FBI agents but painfully obscure to the informant who ends up appointing a wholly inappropriate lawyer to deal with the case. This raises interesting questions as to the ethics of a lawyer taking on a case for which they are entirely unsuited.

First (2001) notes a quote from Whitacre made via phone to court during his trial saying that life in prison was better than life in ADM.

H. First, *The Vitamins Case: Cartel Prosecutions and the coming of International Competition Law* (2001) 68(3) *Antitrust LJ* 711

C. Harding and J. Edwards, *Cartel Criminality: The Mythology and Pathology of Business Collusion* Ashgate, Farnham 2015