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MAKING THE DECISION: WHAT TO DO WHEN FACED WITH INTERNATIONAL CARTEL EXPOSURE

DEVELOPMENTS IMPACTING THE DECISION IN 2010

By

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Gary R. Spratling & D. Jarrett Arp[**]

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I. Introduction

The dramatic surge in worldwide cartel enforcement activity in the last decade continued at remarkable levels in the last couple of years and shows no sign of ebbing in 2010. Perhaps the single most significant factor in this remarkable, decade-long growth has been the adoption by the United States of its amnesty program and the follow-on adoption of analogue programs by the major jurisdictions most active in anti-cartel efforts. The growth of these programs has led not only to a rise in criminal and civil prosecutions by jurisdictions worldwide, but also to a rise in private civil lawsuits that, in their scope, reflect the international nature of cartel activities and government enforcement against such activities.

This paper seeks to provide both an overview and current update with respect to the critical considerations relevant to making *The Decision* – that is, the decision of what to do when faced with international cartel exposure: self-report in order to obtain amnesty/immunity, admit guilt and cooperate if amnesty/immunity is not available, or elect a non-cooperation strategy. It also seeks to offer a primer on the history and policies relevant to international cartel investigations and the now-central concept of leniency.

Among other noteworthy developments in the last few years addressed in this paper are the following:

- The ever-increasing amount of cartel fines imposed by the world's leading antitrust enforcement agencies, particularly the European Commission. See Section IV.1.

- Individual foreign defendants are submitting to U.S. jurisdiction and receiving the longest criminal prison sentences in history, with the average prison sentences of 31 months in fiscal year 2007, 25 months in 2008, and 24 months in fiscal year 2009. See Section IV.2.a.

- An increasing number of jurisdictions besides the U.S. and Canada are imposing criminal sanctions on individuals and corporations and, according to DOJ's predictions, we will soon have criminal cartel enforcement on six continents. See Section IV.2.d.

- The DOJ's relentless pursuit of international cartels continues to include the most aggressive investigation techniques as well as regular use of the most forceful tools to pursue fugitive defendants, including border watches, Interpol Red Notices, and even extradition. See Section IV.4 and IV.6.

- The European Commission's proposal for a streamlined settlement procedure for

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the targets of cartel investigations. See Section IV.7.

- The DOJ's first guidance documents on its Corporate Leniency Policy in 15 years, including Frequently Asked Questions and Model Leniency Letters that provide a comprehensive resource on recurring issues. See Section V.A.

- The DOJ's first-ever revocation of an amnesty applicant's conditional amnesty, and that revocation's subsequent rejection by the U.S. courts after the DOJ attempted to prosecute amnesty applicant Stolt-Nielsen S.A. for its involvement in the international parcel tanker shipping cartel, leading to greater specificity by the DOJ in dealing with amnesty applicants. See Section V.B.5.

- The increase in the number of leniency programs worldwide as over 35 countries have developed or are in the process of developing their own leniency policies. See Section V.C.1.

- The Report and Recommendations of the Antitrust Modernization Commission, which recommended that Congress enact comprehensive legislation reforming direct and indirect purchaser litigation in connection with the Class Action Fairness Act. See Section VI.A.3 and VI.E.3.

Making The Decision In 2010. Section II reviews the typical steps a company takes when faced with international cartel exposure. In particular, it describes the basic considerations a company usually examines when evaluating The Decision. Section III builds upon, but moves beyond, these typical considerations to set forth a set of core "rules" that almost always apply to – and should be kept in mind by – companies responding to potential cartel exposure. As such, Section III sets forth a paradigm for advising clients concerning cartel matters that boils it all down to the five most critical considerations. Of course, cartel enforcement policy and practice are continually in flux. Thus, while the basic "rules of the road" remain unchanged, there are developments that any company assessing cartel exposure in 2010 must have in mind. Section IV provides a current update, exploring several critical recent developments that will impact the decision-making process addressed in Sections II and III.

A Brief History and Overview of Cartel Enforcement Policies. Sections II-IV, described above, provide a current roadmap for assessing cartel exposure and making The Decision – and they assume basic familiarity with criminal and civil cartel enforcement and leniency policies. For readers who do not come to this paper with background on these issues, Sections V and VI provide a primer and overview. In particular, Section V describes the international cartel enforcement arena in which the paradigm operates and which has given rise to such significant recent developments. It provides a brief history of the U.S. policy, and goes on to discuss leniency and enforcement in other major jurisdictions. Section VI explains the growth in cartel-related civil litigation and addresses various policy issues increasingly encountered in civil litigation. Finally, in Section VII the paper concludes with a discussion of the future of anti-cartel enforcement, including challenges faced by enforcement agencies.

II. The Decision: What To Do When Faced With International Cartel Exposure

A company's analysis of The Decision – what to do when faced with international cartel exposure – typically involves an examination of the following considerations.

A. Recognition Of And Adjustment To The Starting Point In The Risk Analysis.

When a company detects a possible cartel violation, the first step in the risk analysis is to ask the question: "How did the company detect the possible violation?" The company's starting point in the analysis, the number and scope of analytical steps, and the length of time the company has to make The Decision are all controlled by the answer to that question.

Some common ways that companies "detect" possible cartel violations include: (1) an internal audit as part of a corporate compliance program; (2) an anonymous letter received by the general counsel (often from an employee); (3) an invitation to join an ongoing cartel; (4) information that one or more other participants in anti-competitive activity (in which the company was involved) have withdrawn; (5) fallout from an employee's termination/resignation for refusal to follow a superior's instructions regarding participation in anti-competitive activity; (6) an admission of cartel conduct by an employee to a management official or general counsel; (7) receipt of a grand jury subpoena; (8) service of a search warrant in the United States or the occurrence of a dawn raid in other jurisdictions; (9) a visit to the home of a senior executive of the company by a DOJ attorney and an F.B.I. agent; and (10) worst of all, some combination of the foregoing, such as simultaneous grand jury subpoenas and search warrants in the U.S., dawn raids or inspections in other jurisdictions, and drop-in interviews in one or more jurisdictions.

Each of the above-mentioned situations represents a different starting point in the company's risk analysis. They are very different in terms of the likely opportunities for amnesty, leniency, or other favorable treatment; very different in terms of the risk of delay to the preservation of opportunities; and, therefore, very different in terms of the speed required in making The Decision.

B. Assessment Of Evidence Of Possible Cartel Violation.

The company must engage in an expedited assessment of the quality of evidence concerning a possible cartel violation before it takes further action. That assessment typically involves some sort of internal inquiry by the company. Yet the internal inquiry itself can set in motion reactions within the company leading to internal and, if the fact of the inquiry becomes known outside the company, external consequences. Obviously, the confidence the company must have in the quality of evidence increases significantly with each step in the assessment process, as the action the company considers escalates from a quiet internal audit, to interviewing key employees, to conducting a full internal investigation, and, finally, to making The Decision whether to seek leniency/amnesty.

C. Projection Of Potential Exposure To Enforcement Authority Sanctions.

The company must make a projection of its potential exposure to sanctions from enforcement authorities in each jurisdiction, one-by-one, as well as its cumulative exposure. The premise here is that cartel activity will violate the anti-cartel provisions of the antitrust laws of *every* jurisdiction where the company sold the cartelized product or service. Therefore, a meaningful projection requires that the company forecast the specific jurisdictions that are likely to take action against the particular anti-competitive activity (if discovered). As to those jurisdictions likely to impose sanctions, the company should consider both the maximum as well as the most likely level of penalties that may be imposed by the antitrust authority on both the company and, where applicable, its employees. For the company, this consideration involves an examination of sanctions such as criminal, civil, and administrative fines, restitution, possible suspension and/or debarment, probation, and court monitoring or supervision. For the company's employees, it involves examination of sanctions such as jail sentences, fines, probation, travel limitations, and governance restrictions.

D. Identification And Evaluation Of Opportunities To Avoid Or Mitigate Sanctions.

In nearly all jurisdictions, the only way to avoid or mitigate the severe sanctions for cartel conduct is through self-reporting or early cooperation pursuant to an amnesty or leniency policy. In most jurisdictions the difference in sanctions between the self-reporting company and the next company to cooperate (number two) is typically enormous. The differences between the number two company and the number three company are also typically very sizeable. Similarly, in those increasing numbers of jurisdictions that provide for criminal sanctions, the difference between the individual who self-reports (either alone or as part of a company application) and the individual who comes in second or third, is even more striking: it is the difference between jail and no jail. Consequently, just as for the projection of a company's potential exposure, the identification and evaluation of an individual's immunity and exposure-mitigation opportunities must proceed jurisdiction-by-jurisdiction, and be appraised and prioritized according to the severity of the corresponding sanction.

E. Analysis Of Civil Litigation Costs.

A company evaluating The Decision to self-report or even to cooperate in the international cartel context must appreciate that it will face near-certain civil litigation in the United States, and possibly in other jurisdictions as well. A company almost always analyzes the likely cost of the litigation and its settlement as part of The Decision because in recent years civil litigation costs in the United States alone have, at times, exceeded the combined cost of government sanctions in all jurisdictions. In considering these costs, the company must remember that, in the United States, an amnesty applicant is precluded by the DOJ's Leniency Policy and a pleading defendant is collaterally estopped from denying the violation in civil litigation. While a successful amnesty applicant may see its private damages exposure reduced, the amnesty applicant or cooperating defendant in a cartel matter still faces a daunting mass of civil litigation, as Section VI of this paper discusses. Unlike the sanctions imposed by enforcement authorities, there is *no way to avoid* the civil litigation costs.

F. Integration Of The Foregoing Considerations.

The Decision requires a company to integrate the foregoing considerations. Such a process is exceedingly difficult, even when there is agreement on the values to be assigned to the range of considerations and variables noted above, which there rarely is. On one point, there appears to be consensus. The exposure of senior executives – wherever located – to jail in the U.S. is almost always assessed as the principal risk and, therefore, the primary factor in making The Decision. However, the evaluation of the net difference in costs and benefits to the company and to its employees across multiple jurisdictions between seeking leniency/amnesty and some other strategy can be so complex as to confound even the most clear-thinking counsel and business executives. Some have compared The Decision to three-dimensional chess. The authors believe that the efficacy of a company's decision-making process is enhanced with the application of some core rules and a methodology that we call A Paradigm for Making The Decision.

III. A Paradigm For Making The Decision

As anyone who represents companies subject to international cartel investigations knows, the world has changed. Increased enforcement efforts, the growth of amnesty programs across the globe, and complex civil litigation exposure require a new and different response from inside and outside counsel.

In the authors' experience, this has given rise to a paradigm for counsel in international cartel matters. The rules of the road in cartel matters are reasonably simple to understand, but a daunting challenge to implement.

One thing hasn't changed in these rules of the road: incarceration in the U.S. is still the animating focal point in the risk analysis most companies undertake. The authors have consistently found that even as new developments alter the landscape these rules are designed to navigate – a point elaborated on in Section IV – the potential for criminal exposure in the U.S. still drives the decision-making on whether or not to report. Until other jurisdictions with the potential for criminal penalties begin imposing them, the U.S. will always be the first stop in the leniency process unless there is no chance of criminal exposure in the U.S.

Chief among the new rules of the road are the following five points.

RULE NO. 1: SPEED WINS.

The U.S. DOJ's amnesty policy awards the greatest benefits – immunity for the company and its employees with respect to any sanction under federal criminal law arising from the reported antitrust violation – to the first party in the door to report an offense. This is also true of

the leniency policies in Canada, the EU, and other jurisdictions. That said, there is also a significant value in being *second* in the door, as opposed to third or fourth.[1]

Regardless of whether amnesty is available or not, however, if a company with criminal exposure for cartel-style collusion learns of a DOJ investigation or has reasons to believe another member of the cartel is evaluating whether it could or should turn itself in, moving fast is critical. If there is a reportable violation and at least one member of the cartel has a compelling reason to report it, it will be reported. With the United States', Canada's, the EU's, and Japan's practices of allowing companies to put down a "marker" claiming their spot in line once they have enough information to confirm they will report a criminal violation, "speed wins" because the fastest party will claim all of the protections offered by the amnesty policies in these jurisdictions.[2]

Thus, companies and their counsel have to be capable of responding swiftly on short notice, collecting the relevant facts and making a decision on how to proceed on a potentially global scale in a matter of days – and sometimes hours – to maximize a client's interests if a decision is taken to report a violation to the government. In the case of at least one cartel matter in recent years, the difference between the marker call from the party who received amnesty and the party who was awarded the runner-up position (and, as a consequence, a corporate guilty plea and jail exposure for some of its employees) was less than ten minutes.

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[1] For an elaboration on this point, see Scott D. Hammond, *Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations*, address before the ABA Section of Antitrust Law 5th Annual Spring Meeting (March 29, 2006) (hereinafter "Second-In Cooperation"); Gary R. Spratling, *Characteristics Of The International Cartel Enforcement Environment: The United States – 2002*, address before The New York State Bar Association's Antitrust Law Section Annual Meeting 2003 (Jan. 23, 2003) (hereinafter "International Cartel Enforcement Environment") (noting that the second company to report typically receives large financial advantages as compared with later finishers and that parties that are third, fourth, or fifth to cooperate may pay an additional 10-20 percent of their volume of affected commerce as a criminal fine).

[2] While the EU has adopted a marker system, its policies differ greatly from the United States and Canada. As discussed below, the discretionary nature and burdensome disclosure requirements of the EU's marker system greatly increase the amount of time applicants must spend investigating before requesting a marker. Other jurisdictions that have recently adopted markers include Australia and Japan. *See* Section V below.

RULE NO. 2: IF YOU REPORT IN THE U.S., YOU LIKELY WILL WANT TO PROMPTLY REPORT IN THE EU, CANADA, THE U.K., AND BRAZIL, AND POSSIBLY IN JAPAN, KOREA, AND AUSTRALIA AS WELL.

When evaluating how to advise a company with respect to exposure arising from an international cartel, the first issue to consider is normally how to proceed in the U.S., because of the severe corporate and individual criminal sanctions the U.S. imposes. That does not end the analysis, however. If a company involved in international collusion with multinational competitors regarding a particular product decides to apply for amnesty in the U.S. pursuant to the DOJ's amnesty policy, it will almost always – assuming, of course, that it has significant exposure in other jurisdictions and can qualify for immunity/amnesty there – make sense to do the same in Canada, the EU, and possibly other jurisdictions.

The reason is simple: If you turn yourself in to the U.S. DOJ, you can do so on a confidential basis,[3] but the DOJ is still going to go forward with an investigation in the U.S. In moving its investigation forward, the DOJ will serve grand jury subpoenas on your competitors. Antitrust Division lawyers and the FBI may also conduct home residence drop-in visits with your competitors' senior management. In due course, that investigation and/or prosecutions flowing from it will become public, potentially drawing the interest of foreign enforcers who see the same competitors present in their countries.

Inevitably, your competitors will learn of the investigation. If the cartel was international in nature, your competitors will assume you have self-reported with the EC and Canada, at a minimum – with the EC because of the potential fine exposure and with Canada because, even if the Canadian sales involved are small, Canada criminalizes cartel conduct and in many product areas, activities that impact competition in the U.S. are highly likely to have some impact in Canada. Your competitors may also assume, depending on scope of conduct and jurisdictional considerations, that you have self-reported with the U.K., Brazil, Japan, Korea, and Australia.[4] Your competitors will likely move quickly to self-report in those jurisdictions in order to reap the remaining benefits for cooperation – and if you have not reported in those jurisdictions, they will reap the full benefits of immunity or leniency, leaving you out in the cold.

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[3] The U.S. will not (nor will the EU or Canada) disclose the identity of the amnesty applicant, nor the content of information it provides in support of its application, to any other person, including any other enforcement authority, without a waiver from the applicant authorizing such disclosure. *See* Gary R. Spratling, *Making Companies An Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy – An Update*, address before the Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust (Feb. 16, 1999) (hereinafter "Corporate Leniency Policy Update").

[4] For a further discussion of the leniency policies and enforcement activity in the U.K., Japan, Korea, Australia, and Brazil, see Section V.C.1 and Section V.C.2 below.

It bears noting that even if a company's collusion with multinational competitors was largely segmented – that is to say, there was an agreement related to North America and a separate, different agreement among different representatives of some of the same companies relating to Europe – the company probably still has to report in all relevant jurisdictions. Co-conspirator competitors are likely to assume that the amnesty applicant in the U.S. applied in the EU with respect to the European conduct or, if it has not yet done so, it will soon, and will therefore report their own conduct as expeditiously as they can, leaving the U.S. amnesty applicant at risk in the EU if it does not report, or waits to report.

It seems likely that the list of "must-report" jurisdictions will expand as the number of jurisdictions with criminal sanctions or significant records of enforcement increases. Because the U.K. has brought criminal prosecutions against three individuals in Marine Hose and four individuals in Air Transport, it certainly is a "must-report" jurisdiction. And with the very aggressive increase in criminal prosecutions of companies and individuals for cartel conduct in Brazil, along with an accompanying increase in leniency applications to Brazil's chief investigative body for matters related to anticompetitive practices, one must add Brazil to that list.[5] Now that Japan has enhanced its criminal sanctions and increased referrals of cartel participants to prosecutors, one may add them to the list of presumptive must-apply venues if there is relevant trade and conduct there. Korea's increasingly aggressive enforcement and its willingness to assert extraterritorial jurisdiction may prompt adding Korea to the list. And Australia's adoption of criminal sanctions, coupled with the reported statements of senior enforcement officials that cartel conduct will be pursued aggressively, may cause Australia to be on that list as well.

RULE NO. 3: YOU CANNOT AVOID – AND THEREFORE MUST NOT FAIL TO CONSIDER – AMNESTY PLUS, PENALTY PLUS, AND THE OMNIBUS QUESTION.

The typical requirement of applying for leniency in multiple jurisdictions is not the only irreversible expansion of what, in effect, is mandatory additional cooperation with enforcers when one decides to report an offense to the U.S. DOJ. Three important aspects of the U.S. amnesty program will in many cases inexorably lead to the disclosure of additional cartels or other hard-core per se violations if they exist: Amnesty Plus, Penalty Plus, and the omnibus question in connection with witness interviews.

1. Amnesty Plus

Amnesty Plus allows a cooperating party that was not able to obtain amnesty to better its situation, whether lessening its fine or reducing the penalties applied to its officers and employees, by applying for amnesty with respect to other cartel activity in which it was

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[5] *See An Interview with Mariana Tavares de Araujo*, GLOBAL COMPETITION REVIEW (Dec. 1, 2008).

involved.[6] For a company that has not qualified for amnesty because it contacted the DOJ too late, exploring the possibility of Amnesty Plus is an option to consider and pursue. This is also true in Canada, which has a similar "immunity plus" policy.

Amnesty Plus drives the decision-making of the thoughtful amnesty applicant as well. This is true because, as an amnesty applicant, you can assume that if any of the co-conspirators you are turning in joined you in other collusion and could report that other activity to the DOJ in search of Amnesty Plus credit, they are highly likely to do so. As a consequence, the amnesty applicant needs to evaluate and seriously consider whether to turn in any other cartel activities that its co-conspirators in the first product could themselves elect to turn in shortly, in order to obtain amnesty for the second product and, just as importantly, avoid the consequences of Penalty Plus.

2. Penalty Plus

The DOJ's Penalty Plus policy builds on Amnesty Plus and increases incentives to report with respect to other improper collusion in which the amnesty applicant engaged.[7] Amnesty applicants in the U.S. might assume that none of their competitors in the reported cartel know about and are in a position to tell the DOJ about separate cartel conduct. However, if the DOJ later learns of this separate conduct through the DOJ's own investigatory efforts or the amnesty application of another competitor, Penalty Plus will cause the amnesty applicant to suffer special, additional pain with respect to the separate conduct if it knowingly failed to turn in that conduct at the time of the earlier amnesty application.

3. The Omnibus Question

The aspect of applying for amnesty with perhaps the most coercive and unpredictable potential for forcing an amnesty applicant to report additional conduct to the authorities is the so-called "omnibus question" that the DOJ often puts to witnesses in interviews in connection with granting conditional amnesty or entering a plea agreement.[8]

In this regard, the DOJ regularly asks witnesses whether they know of other collusive conduct. The question is usually not limited to conduct plainly within the five-year statute of limitations. Normally the DOJ limits the question to conduct affecting U.S. commerce, but that is not always clear from the particular phrasing of the question (or as the question is processed in the mind of witnesses for whom English may be a second language).

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[6] For a further discussion of the Amnesty Plus policy, see Section V.B.3. below.

[7] For a further discussion of the Penalty Plus policy, see Section V.B.3. below.

[8] For a further discussion of the omnibus question, see Section V.B.3. below.

If defense counsel suffer nightmares, there is a good chance the nightmares involve the response to an omnibus question. One omnibus question posed to one witness can single-handedly open up an unexpected new investigation – possibly because a new violation was revealed, or because a witness reported activity in another jurisdiction (which the omnibus question may, but usually does not, require), reported activity that ceased more than five years ago (conduct for which the applicant did not need to, and therefore did not, seek amnesty) or even was stretching in an effort to gain favor with the government. Even if the answer points to conduct that does not appear to be actionable in the U.S., the Division may elect to conduct at least a preliminary investigation into the matter. For an amnesty applicant, this can be a costly detour in its cooperation with the DOJ that does not lead to any reportable conduct.

Thus, in evaluating the consequences of making an amnesty application in the U.S., a company should endeavor to assess who the likely DOJ interviewees are going to be and whether they are aware of other conduct – whether bearing on the U.S. or elsewhere – that the company needs to assess. Regardless of counsel's preparation and investigation, there will always remain an element of uncertainty relating to the omnibus question.

RULE NO. 4: NEVER FORGET THE CIVIL LITIGATION.

Every amnesty or leniency application with the U.S. DOJ and in other jurisdictions has a cost in the form of future civil litigation settlements. Responsible prospective amnesty applicants with a desire to cooperate with the government and to make restitution to injured customers (as conditional amnesty requires) will nevertheless need to evaluate as best they can the incremental settlement costs (that is to say, settlement payments beyond what is necessary to make victims whole) in making a decision about whether to seek amnesty.

If a cartel investigation moves forward, civil litigation will of course follow, *even if the investigation proves to have been unfounded*. (Indeed, the authors are aware of one matter in which reports of an investigation led to the filing of over 80 lawsuits, all of which continued to proceed despite the fact that the DOJ closed its investigation without bringing any charges.)

The relationship between the criminal and civil processes can be an awkward one, as discussed below in Section VI – but a company can lessen some of the difficulty encountered with civil litigation by thinking ahead as the government investigation proceeds.[9] Thinking

[9] An example relates to submissions to the government. As discussed below in Section VI, plaintiffs in civil litigation will seek to obtain relevant written submissions made to enforcement jurisdictions. In recent years, civil plaintiffs in the vitamins litigation, for example, successfully obtained certain written communications with the EC and the Canadian Bureau of Competition. For defense counsel, it is therefore important to pursue a "paperless" process to the fullest extent that a given jurisdiction allows.

about the downstream civil litigation effects of each and every action in the amnesty application and cooperation process can help reduce excessive civil litigation exposure.

RULE NO. 5: MOST IMPORTANTLY, AND BECAUSE OF THE FOREGOING, YOU MUST SWIFTLY ENGAGE IN A SIMULTANEOUS RELATIONAL ANALYSIS OF OPPORTUNITIES AND RISKS IN DIVERSE JURISDICTIONS.

Because of the time pressure (Rule 1), the all-or-nothing nature of multi-jurisdictional reporting in most cases (Rule 2), the combined effects of Amnesty Plus, Penalty Plus and the omnibus question (Rule 3), and the civil litigation costs of every decision to seek amnesty/immunity and cooperate (Rule 4), responding to an actual or potential government cartel investigation presents enormous challenges to companies and counsel who advise them. It is almost always impossible to compartmentalize an investigation to a single product area if there is more to be discovered. Even where it is possible to limit exposure, one does not know if and how it can be limited until a thorough analysis has been conducted.

The modern reality is that, to respond to a cartel matter in an intelligent manner that maximizes the interests of the company and its employees, counsel for the company must have the resources, experience, and ability on a highly expedited basis to engage in a simultaneous relational analysis of the criminal and civil opportunities and risks for the company in multiple jurisdictions. Counsel must be prepared to act quickly, and then, in fact, act quickly in whatever manner called for by the facts and analysis. If not, the company loses. While far from a complete listing, some of the steps that must be taken are set forth below.

1. **Immediately gather the facts, interview key witnesses and, where feasible, review significant documents.**[10]

2. **Conduct a jurisdiction-by-jurisdiction analysis of the potential leniency application.**

Counsel must evaluate whether the information collected affects different jurisdictions in different ways.

If an amnesty application appears likely, counsel must make an initial determination of whether it has enough information to support leniency applications in all of the relevant jurisdictions. As noted above and below, convergence in amnesty policies has been striking, but material differences remain. For instance, the U.S. and Canada allow no-names (anonymous)

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[10] Although a lengthy discussion is beyond the aegis of this paper, these critical initial steps should also include the immediate preservation of all relevant documents, data and other potentially relevant information.

markers with very limited information and guarantee applicants time to complete internal investigations prior to submitting a complete application. However, the EC requires applicants to either submit a formal application with a more complete presentation of facts at the front end, or take the less certain course of submitting an application for a *discretionary* marker with significant (albeit not complete) factual disclosures.

A related and more nuanced question is how the time period of the reportable activity may affect the company's overall strategy. This alone can be a critical issue since different jurisdictions have varying statutes of limitations. The U.S. and EU limitations periods are five years, but Canada has no statute of limitations. Something that might be reportable in Canada may no longer be reportable in the U.S. and Europe.

Similarly, something that is reportable in all jurisdictions may lead to prosecutions of differing periods, a fact that can directly impact the cost of civil litigation settlements. A 20-year period of fragmented stop-and-start collusion may lead to a reportable violation covering the last five years in the U.S. and the EC, and the last *20* years in Canada.

3. Evaluate the scope of civil litigation exposure in all relevant jurisdictions concurrent with assessing whether you can and/or should apply for amnesty.

Among other important questions are the following:

- What are the total direct sales likely subject to civil litigation and overcharge calculations?

- Are the direct customers large or small – and thus likely or unlikely to remain in the inevitable direct purchaser class action lawsuit? Are major customers likely to be receptive to settlement offers? Will they "opt out" of the class action and file their own lawsuit?

- Looking at the facts and the locations where the company is present in the U.S., does it appear likely that a claim for damages arising from foreign sales may succeed?

- Is the product in question susceptible to indirect purchaser claims on behalf of consumers? For example, is the product at issue sold "as is" through a chain of distribution to ultimate consumers (with the price marked up by distributors and retailers, but the product unchanged), or is the product just a raw material or ingredient that may be consumed in the process of making different products that are ultimately purchased by consumers? Of the states that have laws permitting indirect purchasers to recover, does the company have business transactions or other minimum contacts in those jurisdictions sufficient to allow local courts to exercise personal jurisdiction over the company?

4. Continually evaluate the potential "snowball" effects that flow from Amnesty Plus, Penalty Plus, and the Omnibus Question.

This means that counsel must explore everything that company witnesses know, not just their knowledge of the immediate product.

If a company finds that there is possible additional indirect exposure from anticipated reporting by a competitor or a witness, the possible "snowball" effects have to be analyzed. This can be a complicated analysis and one that has to be performed quickly and updated throughout the investigation.

The analysis (or schematic diagram of the snowball fight) should track by amnesty-product competitors, by company witnesses, and by jurisdictions (in which items are reportable) what disclosures of additional collusive activity could flow from reporting the present matter.

This will allow counsel to look ahead and answer important questions, such as the following, for example:

- If you turn in Competitor A on Product X, can Competitor A seek Amnesty Plus credit on Product Y? If yes, in what jurisdictions for what periods?

- If other activities with Competitor A reportedly involved collusion in one jurisdiction, such as the EU, but not in another, such as the U.S., to cite a not-uncommon pattern, what risk is there that Competitor A, under pressure because of its criminal exposure in the immediate investigation, could discover some connection to the U.S. that your company witnesses have not identified to date? Non-amnesty witnesses facing jail time in the U.S. may manage to recall statements and connections that others do not.

- What would the likely company interviewees for the current product say about other activities in response to the omnibus question?

- Evaluating second-tier "snowball" effects may also be necessary. If, for example, a witness would respond to the omnibus question by reporting collusion on new Product Z with Competitor F and one assumes the company will therefore need to apply for amnesty on Product Z, what is the Amnesty Plus-related potential for Competitor F turning in yet another product?

Evaluating just a few of these questions makes it abundantly clear why Amnesty Plus, Penalty Plus, and the omnibus question have led to an exponential growth in reported violations.

IV. Significant Developments In The Factors Companies Must Consider When Making Decisions About Cartel Exposure

International cartel enforcement is a swiftly evolving arena, and the last few years have brought with them notable changes – including several particularly significant developments that companies must consider when engaged in the decision-making process described in Section III above. With respect to government enforcement considerations, they include (1) significant increases in fines, (2) an increasing likelihood of prison sentences, (3) increasing cooperation

among enforcers, (4) increasingly aggressive investigative techniques employed by the DOJ, (5) a newly-realistic risk of extradition for individuals, and (6) the EC's proposed settlement procedure.

1. Significant Increases In Fines

In recent years, fines for violations of the competition laws, particularly for international cartel activities, have been large, sometimes very large. This phenomenon has been primarily driven by the three major enforcement jurisdictions – the U.S., the EU, and Canada. However, the exponential increase in antitrust enforcement all over the world, particularly in the last year or two, has led to the imposition of very significant fines for both domestic and international cartel behavior by jurisdictions that were hardly on counsel's radar screen just a few years ago. Moreover, recent or imminent changes in fine policies and guidelines in some particularly significant jurisdictions, including the EU, Japan, and Australia, portend an even greater upward trend in fine levels that is likely to change the calculus each company must go through when making The Decision about how to proceed in an international cartel matter.

a) Significant Fines

U.S. In fiscal year 2007, the U.S. DOJ imposed over $630 million in fines, a 33 percent increase over the $473 million collected during fiscal year 2006.[11] In fiscal year 2008, the fines

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[11] *See* Scott D. Hammond, *Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program* (Mar. 6, 2008), at 13 (hereinafter "Recent Developments II"); Thomas O. Barnett, Assistant Attorney General, U.S. Dep't of Justice, *Antitrust Update: Supreme Court Decisions, Global Developments, and Recent Enforcement* (Feb. 29, 2008) [hereinafter Barnett, *Antitrust Update*]; Barnett, *Recent Updates*; Thomas O. Barnett, *Criminal Enforcement of Antitrust Laws: The U.S. Model* (Sep. 14, 2006), at 2; United States Department of Justice, Press Release, *Antitrust Division Ends The Year With Second-Highest Level of Criminal Fines, More Merger Challenges* (Dec. 21, 2006).

imposed by DOJ rose to approximately $701 million.[12] And in fiscal year 2009, the DOJ imposed fines of approximately $1 billion.[13]

Two investigations from the past year have resulted in record or near-record fines in the U.S. From 2007 through 2009, the Antitrust Division imposed nearly $1.61 billion in fines, the highest amount ever in a single criminal antitrust investigation, in connection with the Division's ongoing investigation into price-fixing in the Air Cargo industry: $300 million against Korean Air Line Co., Ltd. (August 2007), $300 million against British Airways PLC (August 2007), $61 million against Qantas Airline Ltd. (November 2007), $110 million against Japan Airlines (April 2008), $350 million against Air France-KLM (June 2008), $60 million against Cathay Pacific (June 2008), $42 million against Martinair Holland (June 2008), $52 million against SAS Cargo (June 2008), $109 million against LAN Cargo & Aerolinhas Brasileiras (January 2009), $15.7 million against EL AL Israel Airlines (January 2009), $119 million against Cargolux Airlines International S.A. (April 2009), $45 million against Nippon Cargo Airlines Co. Ltd. (April 2009), and $50 million against Asiana Airlines Inc. (April 2009).[14] Starting in November 2008 and continuing in 2009, the Antitrust Division announced the imposition of $862 million in fines in connection with its investigation into price-fixing in the thin film transistor-liquid crystal

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[12] United States Department of Justice, The Accomplishments of the U.S. Department of Justice 2001-2009 (Jan. 16, 2009) at 3, available at www.usdoj.gov/opa/documents/doj-accomplishments.pdf; *See, e.g.*, United States Department of Justice, Press Release, *Former British Airways Executive Agrees to Plead Guilty to Participating in Price-Fixing Conspiracy on Air Cargo Shipments* (Sept. 20, 2008) (discussing a total of $675 million in fines on six carriers); United States Department of Justice, Press Release, *Fresno, California, Electrical Contractor Pleads Guilty to Bid Rigging on Two E-Rate Funded School Technology Projects* (June 18, 2008) (discussing a $3.3 million criminal fine).

[13] *See* Niall E. Lynch, *International Antitrust Litigation: Civil & Criminal Developments*, address before the 19th Annual Golden State Antitrust & Unfair Competition Law Institute (Oct. 22, 2009) (hereinafter "International Antitrust Litigation").

[14] Department of Justice, Press Release, *Qantas Airways Agrees to Plead Guilty and Pay Criminal Fines For Fixing Prices On Cargo Shipments* (Nov. 27, 2007); *DOJ Slams Air Cargo Cartelists*, GLOBAL COMPETITION REVIEW (June 26, 2008); *DOJ Fines Japan Airlines for Price Fixing*, GLOBAL COMPETITION REVIEW (Apr. 16, 2008); Department of Justice, Press Release, *Major International Airlines Agree to Plead Guilty and Pay Criminal Fines Totaling More Than $500 Million for Fixing Prices on Air Cargo Rates* (June 26, 2008); Kevin O'Connor, Assoc. Attorney Gen., U.S. Dep't of Justice, *Remarks at the Press Conference Regarding Air Cargo* (June 26, 2008); Department of Justice, Press Release, *Japan Airlines International Agrees to Plead Guilty and Pay Criminal Fine for Fixing Prices on Cargo Shipments* (Apr. 16, 2008); Liz McKenzie, *3 Airlines Agree To Pay $124.7M In Criminal Fines*, COMPETITION LAW 360 (Jan. 22, 2009); Department of Justice, Press Release, *Three International Airline Companies Agree to Plead Guilty to Price Fixing on Air Cargo Shipments* (Apr. 9, 2009).

display (TFT-LCD) panel industry: $400 million against LG Display Co. Ltd. (the second largest fine ever imposed by the Antitrust Division), $220 million against Chi Mei Optoelectronics, $120 million against Sharp Corp., $65 million against Chunghwa Picture Tubes, Ltd., $31 million against Hitachi Displays Ltd., and $26 million against Epson Imaging Devices Corp.[15] Commenting on these fines, Thomas Barnett, the then-Assistant Attorney General in charge of the Antitrust Division, noted that "[t]he Board of Directors for LG Display, Sharp and Chunghwa deserve credit for making a timely decision to accept responsibility and cooperate."[16] He further observed that without such cooperation, "[t]oday's fines would have been significantly higher . . . ." These investigations follow on the heels of the criminal investigation into price-fixing in the DRAM industry, which ultimately resulted in fines totaling more than $730 million.[17]

EU. Over the last five years, the EC has consistently imposed the largest cartel fines in the world. In 2007, the EC reached "unprecedented work levels" and collected more than €3.3 billion in cartel fines – an 80% increase over the €1.8 billion imposed in 2006 and an incredible 388% increase over the €683 million imposed in 2005.[18] In 2008 and 2009, there was a decline, but the EC still collected approximately €2.3 billion in fines in 2008 and over €1.6 billion in fines in 2009.[19] The fines collected by the EC in the last five years are well over five times the fines collected by the Antitrust Division in the same period. To commentators who have

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[15] United States Department of Justice, Press Release, *LG, Sharp, Chunghwa Agree to Plead Guilty, Pay Total of $585 Million in Fines for Participating in LCD Price-Fixing Conspiracies* (Nov. 12, 2008); United States Department of Justice, Press Release, *Hitachi to Plead Guilty to Fixing Prices for LCD Panels Sold to Dell Inc.* (Mar. 10, 2009); United States Department of Justice, Press Release, *Epson Imaging Devices Agrees to Plead Guilty and Pay $26 Million Fine for Participating In LCD Price-Fixing Conspiracy* (Aug. 25, 2009); United States Department of Justice, Press Release, *Taiwan LCD Producer Agrees to Plead Guilty and Pay $220 Million Fine for Participating in LCD Price-Fixing Conspiracy* (December 9, 2009).

[16] Remarks Prepared for Delivery By Asst. Atty. Gen. Thomas O. Barnett at a Press Conference Regarding LG, Sharp, and Chunghwa's Agreements to Plead Guilty in LCD Price-Fixing Conspiracies (Nov. 12, 2008).

[17] United States Department of Justice, Press Release, *Samsung Korean Executive Agrees to Plead Guilty, Serve Jail Time For Participating in DRAM Price-Fixing Conspiracy* (Dec. 21, 2006). The fines include: $300 million against Samsung (November 2005), $185 million against Hynix Semiconductor, Inc. (May 2005), $160 million against Infineon Technologies AG (October 2004), and $84 million against Elpida Memory, Inc. (January 2006). *See id.*

[18] European Commission, Press Release, *Statistics* (Dec. 5, 2007); *Conference Hears of DG Comp's Banner Year*, GLOBAL COMPETITION REVIEW (Apr. 22, 2008).

[19] Press Release, European Commission, *Statistics*, *available at* http://ec.europa.eu/competition/cartels/statistics/statistics.pdf (updated Nov. 11, 2009).

criticized the extraordinarily high levels of fines by the EC, Neelie Kroes, the European Union's Commissioner for Competition,[20] has stated that the EC is starting to achieve effective deterrence with their fines. She recently stated:

> Fines were not deterrent in previous decades. Just think about that for a moment… year after year we would catch a cartel and impose a fine that would have little or no effect on a company's incentives. What is the point of that? Now, taking better account of the economic impacts of abuses and cartels, we fine in order to deter, linking the fine to the relevant sales of the infringing company… today's softness is tomorrow's nightmare.[21]

Most of the EC's ten largest cartel fines were imposed in the last three years, and they were levied in the following industries: car glass (over €1.3 billion), natural gas (over €1.1 billion), elevators and escalators (over €992 million), gas insulated switchgear (over €750 million), paraffin wax (over €676 million), synthetic rubber (over €519 million), flat glass (over €486 million), hydrogen peroxide and perborate (over €388 million), acrylic glass (over €344 million), hard haberdashery, fasteners (over €328 million), and copper fittings (over €314 million).

In January 2007, the EC imposed the then-largest set of fines ever imposed on a single cartel, over €750 million against eleven corporations for cartel behavior in the gas insulated switchgear market between 1988 and 2004, only to trump itself in February 2007 by announcing fines of over €990 million against four European companies operating a cartel for the installation and maintenance of lifts and escalators in Belgium, Germany, Luxemburg, and the Netherlands. In December 2007, the EC fined five companies almost €245 million for fixing synthetic-rubber prices and market shares, including an individual €132 million fine secured against Italian energy company Eni. The Eni fine was the result of a 60 percent fine increase for repeat offenses, illustrating the Commission's "hard stance on recidivism."[22]

The record fines of 2007 were then topped in December 2008, when the EC imposed a €1.3 billion fine on four car glass manufacturers, including a fine of €896 million against Saint-

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[20] At the time of this writing, Joaquín Almunia has been nominated to succeed Ms. Kroes as Commissioner for Competition. The European Parliament must consent to his nomination and a consent vote will be held January 26, 2010. *See* Jacqueline Bell, *EU President Taps New Antitrust Chief, Other Top Jobs*, COMPETITION LAW 360 (November 30, 2009).

[21] Neelie Kroes, *European Commissioner for Competition Policy, Antitrust and State Aid Control – The Lessons Learned*, address before the 36th Annual Conference on International Antitrust Law and Policy (September 24, 2009), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/408&format=HTML&aged=0&language=EN&guiLanguage=en.

[22] *Europe Punishes Rubber Cartel*, GLOBAL COMPETITION REVIEW (Dec. 6, 2007).

Gobain, the largest ever sanction against a single company.[23] Like the fine levied on Eni, the Saint-Gobain fine was increased due to Saint-Gobain's status as a repeat cartel offender.[24] This fine followed on the heels of a €676 million fine on nine energy companies involved in a paraffin wax cartel.[25] Had several of the companies not received reduced fines for participating in the EU's leniency program, the total fine would have approached €1 billion.[26] And in October 2008, an EU court upheld a €218.8 million fine imposed on members of a graphite electrode maker cartel in December 2003.[27] In 2009, the high fines continued, with the EC leveling fines of €553 million against natural gas providers E.ON AG and GDF Suez, for a total fine of over €1.1 billion,[28] and another €173.9 million on 24 plastic additive companies.[29] The fines in the EU are particularly striking not only for their size as compared to fines against U.S. companies in the same cases, but also because they represent, on average, a calculation based on a higher percentage of volume of affected commerce than corresponding U.S. fines.

In a landmark decision issued in July 2008, Europe's Court of First Instance upheld a European Commission fine against a consultant in a cartel case, holding that those who *assist* cartels are also liable for anti-competitive behavior. Though the fine amounted to a mere €1,000, it is the first imposed upon a third party not directly involved in alleged cartel activity. The case reflects the EC's move toward a more conduct-based approach to cartel enforcement, and indicates that those who facilitate cartel conduct, not just cartel members, could face significant fines in the future.[30]

In another significant EU development, the EC has announced that it will take private enforcement action against the four elevator manufacturers that it prosecuted in 2007. The

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[23] *DG Comp Glass Cartel Fine Crushes Record*, GLOBAL COMPETITION REVIEW (Dec. 1, 2008).

[24] *Id.* In addition to these record-setting fines, in October 2008, the EC fined three of Europe's largest banana importers €60.3 million for cartel activity. *DG Comp Splits Banana Cartel*, GLOBAL COMPETITION REVIEW (Oct. 15, 2008).

[25] *'Paraffin Mafia' Hit With Cartel Fine*, GLOBAL COMPETITION REVIEW (Oct. 1, 2008).

[26] *Id.*

[27] Christine Caulfield, *EU Court Upholds €218.8M Fine For Graphite Cartel*, COMPETITION LAW 360 (Oct. 8, 2008).

[28] Morgan Bettex, *EU Hits E.ON, GDF Suez With €1.1B Price-Fixing Fine*, COMPETITION LAW 360 (July 8, 2009).

[29] Erin Marie Daly, *EU Fines PVC Heat Stabilizer Cartel $259M*, COMPETITION LAW 360 (Nov. 11, 2009).

[30] *CFI Allows Third Party Cartel Fine*, GLOBAL COMPETITION REVIEW (July 8, 2008).

Commission alleges that, as a public institution, it suffered direct damages from the elevator cartel, and has a duty to seek compensation and safeguard taxpayers' money.[31] If the EC is successful, the private action could establish a precedent for the imposition of additional monetary penalties against companies who violate EC anti-competition law.

Canada. In November 2009, British Airways was fined $4.5 million (Canadian) for its role in the international air cargo cartel, bringing the total amount of fines imposed on cargo airlines, including Qantas, Air France, KLM, and Martinair Holland to $14.6 million (Canadian).[32] In December 2008, Canada's Competition Bureau fined Akzo Nobel Chemicals International $3.1 million (Canadian) for its participation in an international hydrogen peroxide cartel.[33] In November 2007, the Competition Bureau and Department of Justice reached a resolution with the Japanese company SEC Carbon, Ltd. and concluded their investigation of the graphite electrodes cartel with eight convictions and more than $25 million (Canadian) in fines.[34] In October 2007, the Bayer Group pled guilty to three separate cartels and was fined a total of $3.645 million (Canadian) for its involvement in fixing the prices of rubber chemicals, nitrile rubber, and aliphatic polyester polyols.[35] In January 2006, three Canadian paper companies agreed to plead guilty and pay fines totaling $37.5 million (Canadian) for participating in a conspiracy in the carbonless sheets markets in Ontario and Quebec.[36] These are the largest fines ever imposed in Canada for a domestic cartel.

Japan. Japan's Fair Trade Commission (JFTC) has imposed increasingly aggressive fines in recent years, and in 2009, the JFTC imposed its largest-ever fines. In February 2009, the JFTC fined Sekisui Chemical Co. and Mitsubishi Plastics Inc. a total of 11.7 billion yen ($125 million USD) for their alleged participation in a cartel to fix the prices of vinyl chloride pipes.[37] Then, in March 2009, the JFTC fined eleven Japanese transport companies a combined total of

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[31] *DG Comp Seeks Damages From Elevator Cartel*, GLOBAL COMPETITION REVIEW (June 13, 2008).

[32] *BA Hit With Air Cargo Fines In Canada*, GLOBAL COMPETITION REVIEW (Nov. 2, 2009).

[33] *Canada Fines Akzo Nobel*, GLOBAL COMPETITION REVIEW (Nov. 24, 2008).

[34] Competition Bureau, Press Release, *SEC Carbon Pleads Guilty to Conspiracy* (Nov. 9, 2007).

[35] Competition Bureau, Press Release, *Bayer Group Fined $3.645 Million for its Role in Three International Cartels* (Jan. 9, 2006).

[36] Competition Bureau, Press Release, *Competition Bureau Investigation Leads To Record Fine In Domestic Conspiracy* (Jan. 9, 2006).

[37] Ryan Davis, *Mitsubishi, Sekisui Fined $125M Over Pipe Cartel*, COMPETITION LAW 360 (Feb. 18, 2009).

9.05 billion yen ($92.4 million USD) for their role in air cargo price-fixing.[38] In June 2009, the JFTC fined steelmakers more than 10 billion yen ($117 million USD) for fixing the prices of steel plating and coated flat steel.[39] Then, a month later, in July 2009, the JFTC fined MT Picture Display Co., Samsung SDI Co., and other manufacturers of cathode-ray tubes for televisions a combined 3.3 billion yen ($37 million) for their alleged price-fixing activities, although the JFTC's order is currently being challenged.[40] These fines followed on the heels of a move toward larger fines in 2008: in December 2008, the JFTC imposed a fine of 251 million yen ($2.9 million) on Sharp Corp. for its role in the price fixing scheme related to liquid crystal display modules.[41] In January 2008, the JFTC levied a fine of 4.48 billion yen ($41.5 million USD) against three oil companies for rigging bids to deliver oil to Japan's Defense Agency.[42]

Significant fines in other jurisdictions. In the last year, other jurisdictions have also imposed considerable fines, some for the first time. In December 2008, France's Competition Council fined a steel-trading cartel €575.4 million, the highest fine ever imposed by the Council, including a fine of €288 million on PUM Service Acier, the largest fine it had imposed on an individual company.[43] Spain set its own record in 2009, fining six European insurance companies €120 million for their role in a cartel to fix construction insurance prices.[44]

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[38] Richard Vanderford, *Nippon, Others Hit With $92M In Air Cargo Cartel Fines*, COMPETITION LAW 360 (Mar. 18, 2009).

[39] *Japan to Fine Three Steel Companies*, GLOBAL COMPETITION REVIEW (June 26, 2009).

[40] Liz McKenzie, *Japan Fines Panasonic Unit In Price-Fixing Probe*, COMPETITION LAW 360 (July 13, 2009); Tina Peng, *Panasonic Unit Challenges JFTC Order Over CRTs*, COMPETITION LAW 360 (Nov. 9, 2009).

[41] Morgan Bettex, *Japan Fines Sharp $3M In LCD Price-Fixing Scheme*, COMPETITION LAW 360 (Dec. 18, 2008).

[42] Elaine Chow, *JFTC Fines Oil Cos. 4.48 Billion Yen For Bid Rigging*, COMPETITION LAW 360 (Jan. 18, 2008). This culminates an investigation that began in 1999 and has already netted 2 billion yen ($18.6 million USD) in fines against the eight corporate defendants that chose not to contest the JFTC's findings. *Id*.

[43] *France Hits Steel Companies With Record Fines*, GLOBAL COMPETITION REVIEW (Dec. 16, 2008). This fine followed on the heels of the Council's €41.1 million fine on four oil companies operating and airline fuel cartel. *France Hits Oil Cartel*, GLOBAL COMPETITION REVIEW (Dec. 5, 2008).

[44] Allison Grande, *Spain Hits 6 Insurers with €120M Price-Fixing Fine*, COMPETITION LAW 360 (Nov. 12, 2009).

b) Legislative And Policy Changes

Recent or pending legislation or policy changes in a number of jurisdictions will undoubtedly have an impact on the fines levied against cartel participants. While the U.S. has been able to avoid the limitation of the previous maximum fine under the Sherman Act by resorting to the use of an alternative fine statute, other countries have been somewhat limited in the fines they could impose. New and upcoming revisions are likely to change that.

U.S. The Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which significantly increased the maximum penalties for antitrust offenses in the U.S., continues to directly impact The Decision.[45] The legislation has three critical provisions: (i) an increase in the maximum fine for a company from $10 million to $100 million; (ii) an increase in the maximum fine for an individual from $350,000 to $1 million, and the maximum jail sentence from three to ten years; and (iii) a potential reduction in the civil damages exposure of an amnesty applicant from treble damages to actual damages caused by the applicant. In addition, in November 2005, the U.S. Sentencing Guidelines were amended to reflect the changes in fines.[46] The amended Guidelines increase the base offense level and the volume of commerce table used to calculate fines in order to bring penalties for antitrust offenses in line with penalties for other white-collar offenses, reflect the financial magnitude of antitrust crimes, and provide greater a deterrent effect.[47]

EU. In June 2006, the EU revised its guidelines for the determination of fines.[48] The changes allow for the imposition of significantly greater fines, and are intended to increase the deterrent effect of the already-substantial penalties imposed by the EC. The revised guidelines have three key features: (i) fines are now linked to the duration of the activities – up to 30 percent of a company's annual sales relating to the activities, multiplied by the number of years in which the activities took place; (ii) fines will include an "entry fee" of 15 to 25 percent of a cartel participant's annual sales in the relevant sector; and (iii) the fines for recidivists will be increased. The new fines do not change the cap on the penalty, which is set at 10 percent of a

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[45] The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 is Title II of the Standards Development Organization Advancement Act of 2004.

[46] *See United States Sentencing Guidelines § 2R1.1 (Antitrust Offenses)* (amended effective Nov. 1, 2005).

[47] *See United States Sentencing Guidelines, Supplement to Appendix C – Amendments to the Guidelines Manual, amend. 678* (Nov. 1, 2005).

[48] European Commission, *Guidelines On The Method Of Setting Fines Imposed Pursuant To Article 23(2)(A) Of Regulation No 1/2003* (2006); European Commission, *Competition: Revised Commission Guidelines For Setting Fines In Antitrust Cases – Frequently Asked Questions* (June 28, 2006); European Commission, Press Release, *Commission Revises Guidelines For Setting Fines In Antitrust Cases* (June 28, 2006).

company's total turnover in the preceding business year, but they certainly make it more likely that fines will approach the cap in certain circumstances.

In June 2008, the EC announced a settlement procedure that allows cartel members to reduce their fines by 10 percent if they decide to acknowledge their involvement in and liability for the cartel activity after seeing the evidence in the Commission file against them.[49] This procedure is discussed in greater detail in Section IV.7 below.

Japan. The legislative changes that went into effect in January 2006 in Japan included, in addition to a leniency policy, an increase in surcharges for cartel behavior from six percent to ten percent of the turnover in the cartel period, for a maximum period of three years.[50] The surcharge rate increases to 15 percent for recidivist companies, and remains at 6 percent for companies that terminated their conduct before January 4, 2006, the effective date of the increase. As then-Secretary-General Uesugi pointed out at the ABA Section of Antitrust Law Fall Forum in November 2005, the increase in the maximum surcharge from 6 percent to 15 percent for repeat offenders represents a *250 percent* increase in maximum fines.[51] In October 2007, Japan proposed amendments to the Anti-Monopoly Act that would increase the surcharge on companies that played a leading role in cartels, but the proposal does not specify the amount of a penalty or the method of applying this aggravating factor.[52] On June 3, 2009, Japan again increased monetary fines for cartelists. In an amendment to its Anti-Monopoly Act, surcharges increased by 50%, from 10% to 15%.[53]

Korea. Revisions to Korea's Monopoly Regulation and Fair Trade Act took effect in April 2005. They provide for an increase in fines against cartel participants from a maximum of five percent to a maximum of ten percent of sales in related goods or services.[54]

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[49] *EU Settlements Procedure Met with Skepticism*, GLOBAL COMPETITION REVIEW (June 30, 2008).

[50] *See* Uesugi, *Leniency Policy A La Japonnaise*, at 6.

[51] Uesugi, *Leniency Policy A La Japonnaise*.

[52] While the proposal would also increase the statute of limitations from three years to five years, fines would not increase because the surcharge calculation would still consider only the last three years. Japan Fair Trade Commission, Press Release, *Prospective Amendments to the AMA* (Oct. 16, 2007).

[53] Japan Fair Trade Commission, *Summary of the Amendment to the Antimonopoly Act* (June 2009), available at http://www.jftc.go.jp/e-page/pressreleases/2009/June/090603-2.pdf.

[54] *See Monopoly Regulation and Fair Trade Law, Article 35, Surcharge*. The amendments also provide a reward for parties that report illegal activity, and create a legal basis for the extraterritorial application of Korean competition law.

Australia. The Australian Parliament has increased its maximum fines to the greater of $10 million or *three times* the value of the benefit from the cartel, or where the value cannot be determined, 10% of annual turnover, an increase that could have a staggering impact on fines in Australia.[55]

China. In 2009, the Chinese government adopted a number of rules to help enforce the country's new anti-monopoly law, which itself went into effect in August 2008. In June, 2009, China's State Administration for Industry and Commerce (SAIC) announced rules establishing procedures for antitrust investigations and enforcement, including rules governing what information must be included in antitrust complaints, and granting both the SAIC and local authorities the power to request information from companies under investigation and from third parties.[56]

2. The Rising Likelihood Of Prison Sentences

The authors believe that, along with the continuing development and enhanced effectiveness of leniency policies, individual criminal penalties will shape the future of international cartel enforcement. Put simply, *nobody wants to go to prison*. And, as the likelihood of going to jail in any number of jurisdictions grows, so will the effect on self-reporting, detection, and deterrence.

The DOJ has consistently maintained that jail sentences for individuals are the most effective deterrent to cartel activity and the greatest incentive to self-report, and has pledged to "hold *individuals*, as well as corporations, responsible for engaging in criminal conduct."[57] The

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[55] *See* Australian Competition and Consumer Commission, Media Release, *Up To 10 Years Jail For Serious Cartel Conduct* (June 19, 2009), available at http://minister.innovation.gov.au/Emerson/Pages/UPTO10YEARS.aspx.

[56] Brendan Pierson, *China Adopts New Rules to Enforce Monopoly Law*, COMPETITION LAW 360 (June 9, 2009).

[57] United States Department of Justice, Press Release, *Former Qantas Airline Executive Agrees to Plead Guilty to Participating in Price-Fixing Conspiracy on Air Cargo Shipments* (May 8, 2008) (emphasis added); *See* Scott D. Hammond, *Recent Developments, Trends, and Milestones In The Antitrust Division's Criminal Enforcement Program*, address before the ABA Section of Antitrust Law (Nov. 16, 2007) (hereinafter "Recent Developments I"), Scott D. Hammond, *The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits For All*, address before the Organisation for Economic Co-operation and Development Competition Committee (Oct. 17, 2006) (hereinafter "Negotiated Plea Agreements"); Thomas O. Barnett, *Criminal Enforcement Of Antitrust Laws: The U.S. Model*, address before the Fordham Competition Law Institute (Sept. 14, 2006), at 3; Scott D. Hammond, *Charting New Waters In International Cartel Prosecutions*, address before the National Institute on White Collar Crime (Mar. 2, 2006) (hereinafter "Charting New Waters"); Scott

[Footnote continued on next page]

DOJ is unwilling to give individuals with culpability a free pass, and has gone on record as saying that the Division "now insists on jail sentences for *all defendants* – domestic and foreign."[58] The Division's focus on individual culpability is reflected in three of the most important developments in U.S. antitrust enforcement in recent years: (1) the imposition of longer sentences, (2) the imposition of sentences on a larger number of foreign nationals and (3) the increasing number of individuals carved out of plea agreements for separate treatment.

a) Longer Prison Sentences In The United States

The average prison sentence imposed on defendants in antitrust cases in the U.S. rose steadily between fiscal year 2000, with a 10-month average sentence, and fiscal year 2007, with a 31-month average sentence, the highest level ever.[59] Although 2008 and 2009 saw moderate reductions in average sentence length to 25 months and 24 months respectively,[60] the average sentence remains of sufficient length to generally drive the strategic decision-making by companies and individuals faced with international cartel exposure. Importantly, both the total number and the percentage of antitrust defendants being sentenced to jail in Department of Justice investigations is increasing.

In January 2009, the DOJ secured a 48-month jail sentence in its investigation into collusion in shipping freight services between the continental United States and Puerto Rico, the longest jail sentence ever imposed for a single antitrust charge. Peter Baci, a shipping executive,

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[Footnote continued from previous page]
D. Hammond, *An Update Of The Antitrust Division's Criminal Enforcement Program* (Mar. 2, 2006), at 1 (hereinafter "Criminal Enforcement Update"), at 3; Scott D. Hammond, *When Calculating The Costs And Benefits Of Applying For Corporate Amnesty, How Do You Put A Price On An Individual's Freedom?*, address before the National Institute On White Collar Crime (Mar. 8, 2001) (hereinafter "Calculating the Costs and Benefits"); Gary R. Spratling, *Negotiating The Waters Of International Cartel Prosecutions*, address before the National Institute on White Collar Crime (Mar. 4, 1999).

58 Hammond, *Charting New Waters*, at 16 (emphasis in original). Indeed, the practice of including prison sentences in plea agreements has continued unabated. *See, e.g.*, United States Department of Justice, Press Release, *Four Shipping Executives Agree to Plead Guilty to Conspiracy to Eliminate Competition and Raise Prices for Moving Freight To and From the Continental U.S. and Puerto Rico* (Oct. 1, 2008).

59 Hammond, *Recent Developments I*, at 5.

60 *See* Niall E. Lynch, *International Antitrust Litigation: Civil & Criminal Developments*, address before the 19th Annual Golden State Antitrust & Unfair Competition Law Institute (Oct. 22, 2009) (hereinafter "International Antitrust Litigation"); United States Department of Justice, The Accomplishments of the U.S. Department of Justice 2001-2009 (Jan. 16, 2009) at 4 (hereinafter "Accomplishments of the U.S. Department of Justice"), available at www.usdoj.gov/opa/documents/doj-accomplishments.pdf.

agreed to plead guilty to participating in a conspiracy to suppress and eliminate competition in the U.S.-Puerto Rico shipping lane.[61] This case further illustrates that the DOJ is seeking longer jail sentences and will seek multi-year sentences against individuals even when they agree to enter into plea agreements.

The total number of jail days imposed annually has also risen sharply in recent years. Prior to 2000, the highest annual total was 7,473 jail days.[62] In fiscal year 2005, defendants were sentenced to 13,157 jail days, a record at that time.[63] In 2007, that figure more than doubled to an all-time high of 31,391 jail days.[64] As with average sentence length, 2008 saw a reduction in jail days imposed to 14, 331, although the number returned to near-record levels in 2009 with 25,396 total jail days imposed.[65]

The frequency of jail sentences also rose, with 87% of defendants receiving jail sentences in fiscal year 2007, 61% receiving jail sentences in fiscal year 2008, and 80% receiving jail sentences in fiscal year 2009.[66]

b) Foreign Nationals Facing Jail In The United States

More and more of the individuals facing jail sentences are foreign nationals. The DOJ has stated that foreign nationals "are expected to serve jail sentences in order to resolve their criminal culpability."[67] To this end, the expansion of the Division's international cartel program has led to the prosecution of individuals from a number of different nations outside of the United States, including Austria, Belgium, Canada, France, Germany, Italy, Japan, Korea, Mexico, Norway, the Netherlands, Korea, Sweden, Switzerland, Taiwan, and the United Kingdom.[68] In December 2007, three defendants in a cartel involving marine hose agreed to plead guilty to antitrust conspiracy charges in the United States, to return to the United Kingdom to face charges

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[61] United States Department of Justice, Press Release, *Former Shipping Executive Sentenced to 48 Months in Jail for His Role in Antitrust Conspiracy* (January 30, 2009).

[62] Hammond, *Recent Developments I*, at 1.

[63] *Id*. at 1.

[64] *Id*. at 1, 3.

[65] Lynch, *International Antitrust Litigation*.

[66] *Id.*

[67] Hammond, *Recent Developments I*, at 6.

[68] Hammond, *Criminal Enforcement Update*, at 4. *See also* Barnett, *Seven Steps*, at 5; Hammond, *Recent Developments I*, at 6.

of violating the UK's Enterprise Act of 2002, and to receive credit in the United States for prison sentences imposed in the United Kingdom.[69] The plea agreements were not only unprecedented in addressing the defendants' criminal exposure in two jurisdictions simultaneously, but also highly visible testaments to the ever-expanding scope of international cooperation among enforcement authorities.

The average prison sentence imposed on foreign defendants in antitrust cases in the U.S. has also increased. In fiscal year 2007, the average jail sentence imposed on foreign defendants reached 12 months, almost double the 6.9-month average in 2006.[70] In fiscal year 2008, the average sentence again rose to approximately 15 months.[71]

And fiscal year 2009 again broke new ground. In January 2009, the DOJ announced plea agreements involving four foreign nationals related to their role in the global price-fixing conspiracy for TFT-LCD panels.[72] A Korean LG executive agreed to a 7-month sentence and three Taiwanese executives for Chunghwa agreed to sentences of 9 months, 7 months, and 5 months, respectively.[73] These agreements mark the first time that Taiwanese nationals will serve sentences in the U.S. for violations of U.S. antitrust laws. In April 2009, the DOJ announced that a fifth foreign national would plead guilty and serve a year in jail in the United States for participating in the TFT-LCD conspiracy.[74] Four other individuals – one former LG executive, two former Chunghwa executives, and one Hitachi executive – have also been indicted.[75]

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69 Barnett, *Antitrust Update, supra* note 10.

70 Hammond, *Recent Developments I*, at 6.

71 *See e.g.* United States Department of Justice, Press Release, *Japanese Executive Pleads Guilty, Sentenced to Two Years in Jail for Participating in Conspiracies to Rig Bids and Bribe Foreign Officials to Purchase Marine Hose and Related Products* (Dec. 10, 2008); United States Department of Justice, Press Release, *Former British Airways Executive Agrees to Plead Guilty to Participating in Price-Fixing Conspiracy on Air Cargo Shipments* (Sept. 20, 2008).

72 United States Department of Justice, Press Release, *Four Executives Agree to Plead Guilty in Global LCD Price-Fixing Conspiracy* (Jan. 15, 2009).

73 *See id.*

74 United States Department of Justice, Press Release, *Korean Executive Agrees to Plead Guilty and Serve One Year in Prison for Participation in LCD Price-Fixing Conspiracy* (April 27, 2009).

75 *See id.*

The marine hose investigation discussed above has also resulted in prison sentences for nine executives. Most recently, in December 2008, a Japanese executive agreed to serve 24 months in connection with this matter.[76] Eight others had already agreed to serve time in prison for their role in the cartel: Bryan Allison (Dunlop Oil & Marine Ltd. - 24 months), David Brammar (Dunlop - 20 months), Peter Whittle (PW Consulting (Oil & Marine) Limited - 30 months), Robert Furness (Manuli Rubber Industries SpA - 14 months), Charles Gillespie (Manuli - 12 months), Christian Caleca (Trelleborg Industrie S.A.S. - 14 months), Jacques Cognard (Trelleborg - 14 months), and Giovanni Scodeggio (Parker ITR S.r.l. - 6 months house arrest).[77] The sentences imposed on Allison, Brammar, and Whittle, in particular, were record-breaking.[78] While Allison, Brammer, and Whittle later had their sentences in the U.K. reduced by the U.K. Court of Appeals from 36 to 24 months, 30 to 20 months, and 36 to 30 months, respectively,[79] it is important to note that the U.K. court constrained itself to the sentences agreed upon in the parallel U.S. investigation, despite indicating its willingness to reduce the sentences even further.[80]

However, not all of the individuals charged with participating in the marine hose cartel have agreed to plead guilty. Two Manuli executives, Francesco Scaglia and Val M. Northcutt were acquitted in federal court in November 2008 after being charged with participating in the conspiracy.[81]

Several executives have also agreed to plead guilty and to serve prison terms in the U.S. for their roles in a cartel involving the Air Cargo industry: Frank de Jong (Martinair Holland NV – 8 months); Keith Packer (British Airways World Cargo – 8 months); Timothy Pfeil (SAS

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76 United States Department of Justice, Press Release, *Japanese Executive Pleads Guilty, Sentenced to Two Years in Jail for Participating in Conspiracies to Rig Bids and Bribe Foreign Officials to Purchase Marine Hose and Related Products* (Dec. 10, 2008).

77 *See id.*

78 *See* United States Department of Justice, The Accomplishments of the U.S. Department of Justice 2001-2009 (Jan. 16, 2009) at 2, available at www.usdoj.gov/opa/documents/doj-accomplishments.pdf.

79 *Court Shrinks Sentences of Marine Hose Three*, GLOBAL COMPETITION REVIEW (Dec. 1, 2008).

80 *See id.*

81 United States Department of Justice, Press Release, *Japanese Executive Pleads Guilty, Sentenced to Two Years in Jail for Participating in Conspiracies to Rig Bids and Bribe Foreign Officials to Purchase Marine Hose and Related Products* (Dec. 10, 2008).

Cargo Group – 6 months); and Bruce McCaffrey (Qantas Airways – 8 months).[82] Recognizing that jail time remains the most effective deterrent to cartel activity, the DOJ has stated that the marine hose conspiracy sentences "should carry a strong deterrent message to members of international cartels that victimize businesses and consumers in the United States and abroad."[83]

c) Increasing Numbers Of Individuals "Carved Out" For Criminal Prosecution In The United States

Increasingly, the DOJ is also imposing greater penalties in the form of larger numbers of individual carveouts from plea agreements with the parties that follow the amnesty applicant in the door.[84] Plea agreements for subsequent parties typically "carve out" one or more executives for separate treatment, which means that such executives are neither subject to the cooperation requirement nor are the beneficiaries of the legal protection provided for in the plea agreement. Put another way, no matter how much cooperation is offered by such executives, the U.S. Department of Justice will not agree to not to bring criminal charges against them.

In the recent air cargo investigation, for example, the DOJ carved six executives out of the plea agreement with number three defendant Qantas, in addition to Qantas agreeing to a US $61 million fine.[85] In the DRAM investigation, the DOJ carved four executives out of the plea agreement with the number two defendant, Infineon, five executives out of the plea agreement with number three defendant, Hynix, *seven* executives out of the plea agreement with the number four defendant, Samsung, and five defendants out of the plea agreement with the number five

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[82] United States Department of Justice, Press Release, Dutch Airline Executive Agrees to Plead Guilty for Fixing Prices on Air Cargo Shipments (April 29, 2009); United States Department of Justice, Press Release, *Former British Airways Executive Agrees to Plead Guilty to Participating in Price-Fixing Conspiracy on Air Cargo Shipments* (Sept. 20, 2008); United States Department of Justice, Press Release, *Former Top SAS Cargo Group A/S Executive Agrees to Plead Guilty to Participating in Price-Fixing Conspiracy* (July 28, 2008); United States Department of Justice, Press Release, *Former Qantas Airline Executive Agrees to Plead Guilty to Participating in Price-Fixing Conspiracy on Air Cargo Shipments* (May 8, 2008).

[83] United States Department of Justice, Press Release, *Statement of Thomas O. Barnett, Assistant Attorney General for the Antitrust Division, on U.K. Crown Court Sentencing of Marine Hose Executives and Independent Consultant for Bid-Rigging Conspiracy* (June 11, 2008).

[84] *See* Hammond, *Negotiated Plea Agreements*, at 15-16; Hammond, *Charting New Waters*, at 17.

[85] *Qantas Officials Could Still Face US Charges*, GLOBAL COMPETITION REVIEW (Jan. 16, 2008).

defendant, Elpida (a much smaller industry participant than the earlier-pleading defendants).[86] In the rubber chemicals investigation, the DOJ carved out three executives from the plea agreement with the number two defendant, Crompton, and five out of the plea agreement with number three defendant Bayer.[87]

d) The Rise Of Criminal Sanctions Outside Of The United States

Just as the likelihood of prison sentences has risen in the U.S., the past year has also seen significant increases in the criminal penalties possible in Canada. In March 2009. Canada's Budget Implementation Act went into effect. Included in this act were substantial changes to the criminal enforcement regime in Canada.[88] Most notably, the maximum penalty for cartel offenses was increased from 5 years to 14 years in prison, effective March 2010. And the maximum fine for conviction was increased from $10 million to $25 million. Also of note is the adoption of *per se* criminal offenses for price-fixing, market allocation, and output restriction.[89]

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[86] *See* Plea Agreement, *United States v. Infineon Technologies AG*, No. CR 04-299 (N.D. Cal. Sept. 14, 2004); Plea Agreement, *United States v. Hynix Semiconductor Inc.*, No. CR 05-249 (N.D. Cal. Apr. 20, 2005); Plea Agreement, *United States v. Samsung Electronics Company, Ltd. and Samsung Semiconductor, Inc.*, No. CR 05-0643 (N.D. Cal. Oct. 13, 2005); Plea Agreement, *United States v. Elpida Memory, Inc.*, No. CR 06-0059 (N.D. Cal. Mar. 8, 2006). All four of the Infineon executives – three German nationals and one U.S. national – agreed to plead guilty, serve prison sentences in the U.S. ranging from four to six months, and pay fines of $250,000 each. *See* United States Department of Justice, Press Release, *Sixth Samsung Executive Agrees to Plead Guilty to Participating In DRAM Price-Fixing Cartel* (Apr. 19, 2007). An Elpida executive, four of the Hynix executives, and six of the Samsung executives, five of whom are Korean nationals, also agreed to plead guilty, serve prison sentences in the U.S. ranging from five to fourteen months, and pay fines of $250,000 each. *See id*; *see also* United States Department of Justice, Press Release, *Samsung Korean Executive Agrees to Plead Guilty, Serve Jail Time For Participating in DRAM Price-Fixing Conspiracy* (Dec. 21, 2006). The remaining two executives from Hynix and Samsung were indicted by a federal grand jury on October 18, 2006. The fate of the remaining four executives from Elpida is not yet known.

[87] *See* Plea Agreement, *United States v. Bayer AG*, No. CR 04-0235 (N.D. Cal. July 8, 2004); (plea agreement in *United States v. Crompton Corporation*, No. CR 04-0079 (N.D. Cal.) not available).

[88] Canadian Competition Bureau, News Release, *Budget Implementation Act Receives Royal Assent* (March 13, 2009).

[89] Canadian Competition Bureau, *A Guide to Amendments to the Competition Act* (April 22, 2009), available at http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03045.html.

This dramatic increase in criminal fines will certainly bring increased attention to Canada for firms making the decision about what to do when faced with international cartel exposure.

Additionally, a increasing number of countries outside of North America have criminal penalties against individuals and/or organizations on the books, but have only recently used them to prosecute cartel participants. Japan, the United Kingdom, Ireland, Brazil, and Egypt have all filed criminal charges against individual cartel participants.[90] Incarceration had not been a serious threat for individual offenders in these jurisdictions – until now.

Two more countries – Australia and Russia – have recently introduced criminal penalties for cartel participants.[91] Developments in the imposition of prison sentences – what the DOJ has called "the global trend towards greater individual accountability"[92] – bear close watching and careful consideration by companies who are seeking to minimize cartel exposure.

Deputy Assistant Attorney General Scott Hammond has said that criminal cartel enforcement is up and coming on six continents.[93]

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[90] *Egypt Fines Cement Executives*, GLOBAL COMPETITION REVIEW (August 22, 2008); *OFT Accuses BA* Executives, GLOBAL COMPETITION REVIEW (August 7, 2008); *Brazil Refocuses on Cartel Enforcement*, GLOBAL COMPETITION REVIEW (Sept. 19, 2008);.*Egypt Prosecutes Cement Cartel*, GLOBAL COMPETITION REVIEW (Jan. 22, 2008); *Three United Kingdom Nationals Plead Guilty to Participating in Bid-Rigging Conspiracy in the Marine Hose Industry* (Dec. 12, 2007), The Irish Competition Authority, *Public Consultation on the Operation and Implementation of the Competition Act 2002* (December 2007), at 2; *Japanese Cartelists Face Jail*, GLOBAL COMPETITION REVIEW (Oct. 17, 2007).

[91] *See* Federal Antimonopoly Service of the Russian Federation, Press Release (October 30, 2009), available at http://www.fas.gov.ru/english/news/n_27502.shtml; Australian Competition and Consumer Commission, Media Release, *Up To 10 Years Jail For Serious Cartel Conduct* (June 19, 2009)

[92] Hammond, *Charting New Waters*, at 2. Despite this trend, the EC, and its member states, have resisted adopting criminal sanctions against individuals. In September 2008, the head of Germany's Federal Cartel Office, speaking at a symposium, noted that the barriers to criminalization in Germany would be high, likely requiring legislative changes to the country's leniency program. *See Germany Slow to Warm to Criminalisation*, GLOBAL COMPETITION REVIEW (Sept. 24, 2008).

[93] *See* American Bar Association, *DOJ Antitrust: International Cartels, Hottest Issue Facing Criminal Enforcement* (April 2009), available at http://www.abanet.org/media/youraba/200904/article08.html; *see also* Belinda Barnett, *Criminalization of Cartel Conduct – The Changing Landscape*, address before Joint Federal Court of Australia/Law Council of Australia (Business Law Section) Workshop (April 3, 2009) ("Soon, six continents will have criminal cartel enforcement.").

Ireland. The Irish Competition Authority has had 18 criminal convictions for cartel activity for individuals and companies since October 2005.[94] In the Spring of 2006, the Irish Competition Authority secured the first prison sentence in Europe for a defendant involved in cartel activity. Part of a group of prosecutions involving multiple guilty pleas and fines stemming from a cartel in the home heating oil industry, the defendant, an individual considered a ringleader of the cartel, pled guilty and was given a six-month suspended sentence. His guilty plea, along with several other pleas, was precipitated by another first, the first criminal conviction for cartel activities anywhere in Europe. That defendant, a small distributor, was convicted by a jury of price-fixing and fined for his involvement in the activities.[95] The 2006 conviction prompted 17 individuals and corporations to plead guilty to criminal charges and yielded €122,000 in court-imposed fines.[96] In 2007, the Irish Competition authority secured another guilty plea under Ireland's 2002 Competition Act. An Irish businessman pled guilty to price-fixing in the car industry and received a 12-month sentence, suspended for five years, and a €30,000 fine.[97] The Competition Authority obtained a total of three criminal convictions in 2007, and initiated proceedings against another 14 individuals for price-fixing Citroën vehicles.[98] In October 2008, it obtained a conviction and three-month suspended sentence in the Citroën matter for an executive who pleaded guilty to price-fixing.[99]

Israel. Israel imposed jail sentences on several executives following the prosecution of a cartel which fixed prices and divided the market for floor tiles over a period of fourteen years. Five individuals, four company executives, and one economic adviser who coordinated and

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[94] The Irish Competition Authority, *Public Consultation on the Operation and Implementation of the Competition Act 2002* (December 2007), at 2.

[95] *See Suspended Sentence For Official In Oil Cartel Case*, IRISH TIMES (Mar. 7, 2006); Ann Healy, *Oil Distributor Convicted Of Price-Fixing*, IRISH TIMES (Mar. 3, 2006).

[96] The Irish Competition Authority, *Public Consultation on the Operation and Implementation of the Competition Act 2002* (December 2007), at 2; *see also* Bill Prasifka, Chairperson of the Competition Authority, opening statement to the Joint Oireachtas Committee on Enterprise and Small Business (Oct. 25, 2006), at 6.

[97] The Irish Competition Authority, *Public Consultation on the Operation and Implementation of the Competition Act 2002* (December 2007), at 2.

[98] *Ireland Report Receives Mixed Reactions*, GLOBAL COMPETITION REVIEW (Mar. 3, 2008); The Irish Competition Authority, *Public Consultation on the Operation and Implementation of the Competition Act 2002* (December 2007), at 2.

[99] *Ireland Convicts Car Dealer*, GLOBAL COMPETITION REVIEW (Oct. 29, 2008).

enforced the cartel each received jail sentences of between three and nine months.[100] Israel also imposed criminal penalties for cartel offenses in the liquefied petroleum gas market. The plea agreement includes jail sentences and fines for three individual defendants, including a 100-day prison sentence for the CEO of SuperGas.[101]

Japan. In 2007, Japan brought its first criminal case based on a leniency application. Construction groups faced criminal fines and five executives received prison sentences for bid rigging. The prison sentences ranged between 18 months and 3 years, with suspended enforcement for 5 years.[102] On June 3, 2009, Japan passed increased criminal sanctions for cartelists. In an amendment to its Anti-Monopoly Act, the maximum prison sentence for engaging in cartel conduct or bid-rigging was increased from three to five years. Additionally, the statute of limitations for cartel conduct and bid-rigging was increased from three to five years.[103]

Egypt. Egypt also recently filed its first criminal charges and issued its first fines for cartel behavior since its Parliament established the Department to Protect Competition and Prohibit Monopoly in 2005. Egypt's general prosecutor announced Egypt's first criminal cartel prosecution against 20 executives of cement companies on January 20, 2008.[104] In August 2008, an Egyptian court ruled that the executives colluded to fix prices and fined them 10 million Egyptian pounds ($1.9 million USD) each for price fixing and dividing the market.[105]

Brazil. Brazil is another jurisdiction that has introduced criminal sanctions, punishable by fines or prison sentences ranging from two to five years, for individuals who engage in cartel behavior.[106] More than 100 executives are currently the subject of proceedings related to

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[100] *See* Thomas O. Barnett, *Criminal Enforcement Of Antitrust Laws: The U.S. Model*, address before the Fordham Competition Law Institute (Sept. 14, 2006), at 6.

[101] Israel Antitrust Authority, Press Release, *Unprecedented Punishments in the LPG Cartel Case – Plea Bargain Includes 100 Days in Prison for Supergas CEO* (Sept. 5, 2007).

[102] *Japanese Cartelists Face Jail*, GLOBAL COMPETITION REVIEW (Oct. 17, 2007).

[103] Japan Fair Trade Commission, *Summary of the Amendment to the Antimonopoly Act* (June 2009), available at http://www.jftc.go.jp/e-page/pressreleases/2009/June/090603-2.pdf.

[104] *Egypt To Put On Trial 20 Executives of Cement Companies For Conspiring to Raise Prices*, INTERNATIONAL HERALD TRIBUNE (Jan. 21, 2008).

[105] *Egypt Fines Cement Executives*, GLOBAL COMPETITION REVIEW (Aug. 22, 2008).

[106] *Brazil Refocuses on Cartel Enforcement*, GLOBAL COMPETITION REVIEW (Sept. 19, 2008).

alleged cartel offenses, and in 2006 and 2007, 10 executives were sentenced to prison terms ranging from two-and-a-half to five years.[107]

U.K. The U.K.'s Enterprise Act 2002 created criminal penalties for individuals who "dishonestly" engage in horizontal price-fixing, bid rigging, market share agreements, and agreements to limit the production or supply of goods or services.[108] In December 2007, the U.K. Office of Fair Trading brought criminal charges against three executives for their involvement in the marine hose conspiracy. This was the first price-fixing case brought under the 2002 law.[109] The so-called "marine hose three" were sentenced to 30-, 24-, and 20-month prison terms by the UK Crown Court and barred from acting as company directors for periods of between five and seven years, marking the first criminal sanctions ever imposed for competition law violations in the UK.[110]

In August 2008, the U.K. Office of Fair Trading brought criminal charges against four current and former British Airways executives. The executives were charged with fixing the prices of fuel surcharges for passenger flights. This was the first time the Office of Fair Trading had instigated a prosecution against individuals under the 2002 law, as the convictions in the marine hose cartel relied heavily on a plea agreement negotiated with the U.S. DOJ.[111]

Australia. The Federal Government of Australia announced in early 2005 that it would amend the Trade Practices Act to include criminal penalties for both individuals and companies for serious cartel conduct, as well as raise substantially the fines against both corporations and individuals.[112] Responding to calls for jail sentences for executives involved in cartel activity,[113] the Australian Federal Government has proposed legislation to criminalize cartel behavior. The Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 creates parallel civil and criminal penalties for serious cartel conduct, with the Commonwealth

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[107] *See id.*

[108] Enterprise Act 2002 §§ 188-191; *see also* Office of Fair Trading, *The Cartel Offence, Guidance On The Issue Of No-Action Letters For Individuals* (Apr. 2003) (hereinafter "OFT Guidance on No-Action Letters").

[109] Michael Peel, *Price-Fix Case Trio to Appear in Court*, FINANCIAL TIMES (Dec. 20, 2007).

[110] *Marine Hose Three Sentenced*, GLOBAL COMPETITION REVIEW (June 11, 2008); *Court Shrinks Sentences of Marine Hose Three*, GLOBAL COMPETITION REVIEW (Dec. 1, 2008).

[111] *OFT Accuses BA Executives*, GLOBAL COMPETITION REVIEW (August 7, 2008).

[112] *See* Treasurer of the Commonwealth of Australia, Press Release, *Criminal Penalties For Serious Cartel Behaviour* (Feb. 2, 2005).

[113] *ACCC Seeks Criminal Penalties*, GLOBAL COMPETITION REVIEW (June 26, 2007).

Director of Public Prosecutions and the Australian Competition and Consumer Commission ("ACCC") entering into a formal memorandum of understanding to establish procedures governing when prosecutions will occur.[114] On June 16, 2009. the Australian Parliament passed these criminal prohibitions on cartel activities. This new anti-cartel law provides for up to 10 years of imprisonment for individuals and is "intended to send a clear message about cartel conduct."[115]

Russia. Russia has also recently introduced criminal sanctions for antitrust violations.[116] Under the new law, which went into effect on October 30, 2009, certain antitrust violations are punishable by up to six years in jail.[117] However, according to the Federal Antimonopoly Service (FAS), criminal charges will only be initiated when an individual has violated the law three times within three years. While the law will be enforced by local law enforcement, a criminal case cannot be initiated without prior processing of the case by FAS.

The rising likelihood of prison sentences may have one particularly significant downside, however. While the threat of their executives being imprisoned incentivizes companies to race for amnesty from prosecution, it may actually have a deterrent effect on companies that don't win that race. If the likelihood is that the second company to plead guilty in the United States, in particular, will be forced in its plea agreement to accept a significant number of its executives being carved out for separate prosecution and imprisonment, and later companies face even greater numbers of executives going to jail, those companies may think twice about cooperation and take their chances at trial.[118] Whether companies will take this gamble in light of the future remains, for now, very much an open question.[119]

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[114] Parliament of the Commonwealth of Australia, House of Representatives, *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Explanatory Memorandum* (Dec. 2, 2008) at 25, 41.

[115] Australian Competition and Consumer Commission, Media Release, *Up To 10 Years Jail For Serious Cartel Conduct* (June 19, 2009).

[116] Federal Antimonopoly Service of the Russian Federation, Press Release (October 30, 2009), available at http://www.fas.gov.ru/english/news/n_27502.shtml.

[117] Davis, Ryan, *Russia Opens Door To Criminal Antitrust Penalties*, COMPETITION LAW 360 (November 5, 2009).

[118] On the other hand, as Deputy Assistant Attorney General Scott Hammond pointed out in a recent speech, the second defendant in the door still enjoys a tremendous advantage over later defendants in terms of number of carveouts and treatment of those carveouts, because they are typically able to offer more valuable cooperation than later defendants. *See* Hammond, *Second-In Cooperation*, at 7-9. Furthermore, Hammond suggests that the reduction in fines and more favorable treatment for culpable executives available for defendants that plead guilty and provide full and continuing cooperation are powerful

[Footnote continued on next page]

3. Increased Cooperation Among Enforcers

The growth of leniency policies has been complemented by a marked growth in informal inter-agency coordination and assistance in recent years. Cooperation and coordination among enforcement agencies is now the norm, and as cooperation increases, particularly among jurisdictions that are new to enforcement, so does the likelihood that a cartel will not be able to escape detection and prosecution on multiple fronts.

Deputy Assistant Attorney General Scott Hammond has laid out the important role of cross-border cooperation:

> The international cartels we are fighting understand the importance of the timely sharing of critical information among participants. If we are to be successful in the fight against cartels, then we must beat cartels at their own game. We must share leads and information. We must coordinate our investigative strategies. We must ensure the element of surprise so that we can simultaneously seize evidence in multiple jurisdictions before it can be concealed or destroyed. We must gain access to subjects, evidence and witnesses that are located outside our borders. International borders can not serve as barriers to our ability to investigate. There can be no safe harbors from which cartel members can operate.[120]

[Footnote continued from previous page]
incentives for corporations and individuals to cooperate despite losing the race for leniency. Hammond, *Negotiated Plea Agreements*, at 3. The reduced penalties for cooperating defendants would explain why 90 percent of corporate defendants charged with antitrust offenses in the last 20 years have entered plea agreements. *Id.* at 2.

[119] For a roundtable discussion on, among other things, the effect of the likelihood of incarceration on cooperation by defendants, see *2006 GCR Roundtable*, at 20; *Roundtable: Cutting-Edge Issues In Cartels*, GLOBAL COMPETITION REVIEW (Apr. 2005) (hereinafter "GCR Roundtable").

[120] Scott D. Hammond, *Beating Cartels At Their Own Game – Sharing Information In The Fight Against Cartels*, address before the Inaugural Symposium on Competition Policy, Competition Policy Research Center, Fair Trade Commission of Japan (Nov. 20, 2003) (hereinafter "Beating Cartels At Their Own Game"); *see also* Scott D. Hammond, *Recent Developments I*; Scott D. Hammond, *Dispelling The Myths Surrounding Information Sharing*, address before ICN Cartels Workshop (Nov. 20-21, 2004); Scott D. Hammond, *Ten Strategies for Winning the Fights Against Hardcore Cartels*, address before the OECD Competition Committee Working Party No. 3 Prosecutors Program (Oct. 18, 2005); MacKenzie, *Enforcers Sans Frontiers*, at 12-16.

And Assistant Attorney General Christine Varney has recently reiterated the importance of international cooperation:

> I would like the Division to continue its fruitful collaboration with international antitrust enforcement authorities… I believe that as targets of antitrust enforcement have expanded their operations worldwide, there is a greater need for U.S. authorities to reach out to other antitrust agencies.[121]

The most significant recent development on this front is in the area of informal cooperation. Jurisdictions continue to engage in formal cooperation pursuant to MLATs, cooperation agreements, and other bilateral or multilateral treaties or arrangements that facilitate the formal sharing of information. Increasingly, they are cooperating informally, a "'pick-up-the-phone' attitude"[122] developed because, as explained by Canadian Commissioner of Competition Sheridan Scott, "[n]o amount of formal cooperation agreements can substitute for the ability to pick up the phone and informally talk something out with a foreign counterpart. . . ."[123]

Informal cooperation means more than just the sharing of leads or information; countries share investigative strategies, offer wider access to people and evidence located within their borders, and coordinate their enforcement efforts.[124] Informal cooperation is effective because authorities do not need to jump through any legislative or judicial hoops or obtain any prior approvals to cooperate regarding the initiation of compulsory process, the coordination of subsequent investigations, the exchange of status reports regarding their investigations, the sharing of investigative plans, and the discussion of their prosecutorial objectives. These kinds of exchanges are happening more and more, on both a bilateral and multilateral basis.

Notably, international enforcers increasingly have joined together in coordinated multi-jurisdictional investigations, even conducting simultaneous surprise searches around the globe. For example, these tactics have been used to target the following alleged international cartels: Refrigerator Compressors (February 2009); Cathode Ray Tubes (November 2007); Freight Forwarders (October 2007); Marine Hoses (May 2007); LCD Screens (December 2006); and Air Cargo (February 2006).

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[121] Christine A. Varney, *Vigorous Antitrust Enforcement In This Challenging Era*, Remarks as Prepared for the United States Chamber of Commerce (May 12, 2009), at 19.

[122] Hammond, *Charting New Waters*, at 6.

[123] Sheridan Scott, *"C" Is For Competition: How We Get Things Done In A Globalized Business World*, address before the Insight Conference (June 17, 2005), at 4-6.

[124] *See* Hammond, *Beating Cartels At Their Own Game*.

Antitrust enforcers from the U.S., Canada, the EU, and Japan first conducted coordinated searches in February 2003, when authorities coordinated raids against manufacturers of heat stabilizers. This unprecedented level of coordination between antitrust enforcement authorities around the world has become much more common place in the last two years. In mid-February 2006, the U.S., EU, several EU member state authorities, and Korea conducted an extensive series of raids and inspections against more than a dozen companies involved in the air cargo industry, including some of the world's major airlines, suspected of price-fixing involving surcharges.[125] In December 2006, the U.S., Canada, EU, Japan, and Korea announced simultaneous investigations of international price-fixing in the market for LCD screens. The investigation of LG Philips in the LCD matter provides a compelling example of the level of cross-jurisdictional coordination between enforcement agencies. In December 2006, the KFTC visited LG Philips' offices in Seoul, Korea on the same day that the JFTC issued notice of an investigation to its offices in Tokyo, Japan and the U.S. DOJ issued a subpoena to its offices in San Jose, California.[126]

The most poignant example of information sharing among enforcement authorities to date is the coordinated arrests and raids in a multi-jurisdictional investigation of marine hose manufacturers in the United States, France, Italy, the United Kingdom, and Japan. The investigation was made public in a dramatic fashion on May 2, 2007 – the DOJ arrested eight foreign executives the day after the executives allegedly attended a cartel meeting in a Houston, Texas hotel.[127] The same day as the arrests, the European Commission and the U.K. Office of Fair Trading (OFT) carried out surprise inspections at the premises of several marine hose producers in France, Italy and the United Kingdom.[128] The following week, the JFTC raided the offices of two marine hose producers, Bridgestone Corporation and Yokohama Rubber

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[125] *See*, *e.g.*, *Airlines Hit By Dawn Raids*, GLOBAL COMPETITION REVIEW (Feb. 15, 2006); Paul Meller, *Big Airlines Raided in Cargo Price-Fixing Inquiry*, THE NEW YORK TIMES (Feb. 15, 2006).

[126] LG Philips, Press Release, *LG.Philips LCD Issues Statement* (Dec. 11, 2006). The LCD market faces simultaneous investigations in Europe, Japan, Korea, and the United States. Yun-Hee Kim, *LCD Makers Face Price-Fixing Probe*, WALL STREET JOURNAL (Dec. 13, 2006).

[127] *See* U.S. Department of Justice, Press Release, *Eight Executives Arrested On Charges Of Conspiring To Rig Bids, Fix Prices, And Allocate Markets For Sales of Marine Hose* (May 2, 2007). In addition to unsealing one complaint and filing a separate complaint that collectively charged the eight arrested individuals with criminal offenses, the DOJ served a subpoena on Goodyear Tire & Rubber Co. Shannon Henson, *DOJ Subpoenas Goodyear In Hose Probe*, available at www.competition.law360.com (May 10, 2007).

[128] *See* European Commission, Press Release, *Antitrust: Commission Has Carried Out Inspections In The Marine Hose Sector*, Memo/07/63 (May 3, 2007).

Company.[129] While the arrest of eight foreign executives the day after an alleged cartel meeting makes this investigation especially dramatic, coordinated worldwide dawn raids have become a standard operating procedure among the world's leading anti-cartel enforcement agencies. The EU and several of its member states have also participated in coordinated raids.[130] Inter-agency cooperation has also included cooperation from foreign authorities in the form of searches in Germany and Japan to aid U.S. obstruction of justice investigations. For example, in one investigation, German authorities deployed over 100 German police officers to conduct multiple searches throughout Germany at the DOJ's request.[131]

International cooperation in the initiation of cartel investigations expanded beyond the usual group of enforcers with the February 2009 coordinated raids of refrigeration compressor manufacturers. On February 18 and 19, 2009, the EC and DOJ announced searches of compressor producers in their respective jurisdictions.[132] Notably, at the same time, Brazilian authorities also raided compressor manufacturers in cooperation with EC and DOJ officials.[133] And, on September 30, 2009, the Brazilian government fined two subsidiaries of Whirlpool 100 million Reais ($57 million), and separately fined eight company executives 3 million Reais ($1.76 million).[134]

Notwithstanding the great advances in coordination of enforcement efforts across jurisdictions, the most significant expansion in informal cooperation involves the exchange of substantive evidence. This is a direct result of the increased frequency of amnesty applicants making applications in multiple jurisdictions and then executing reciprocal cross-waivers between jurisdictions. The amnesty/immunity policies of all jurisdictions (of which the authors are aware) have strict, zero-tolerance confidentiality provisions that prohibit a receiving law

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[129] Elaine Chow, *Japan FTC Probes Rubber Hose Makers*, available at www.competition.law360.com (May 7, 2007).

[130] *See*, *e.g.*, *More Dawn Raids For Energy Sector*, GLOBAL COMPETITION REVIEW (Jun. 1, 2006) (discussing a joint raid by the European Commission and the German Bundeskartellamt).

[131] *See* R. Hewitt Pate, *International Anti-Cartel Enforcement*, address before the 2004 International Competition Network Cartels Workshop (Nov. 21, 2004).

[132] Christine Caulfield, *EU Raids Compressor Makers In Global Cartel Probe*, COMPETITION LAW360 (Feb. 18, 2009); Christine Caulfield, *DOJ Launches Antitrust Probe Of Compressor Makers*, COMPETITION LAW360 (Feb. 19, 2009).

[133] Emily Gray, *DG Comp Raids Refrigeration Companies*, GLOBAL COMPETITION REVIEW (Feb. 19, 2009).

[134] Sebastian Perry, *Fridge Cartelist pays 'Landmark' Fine In Brazil*, GLOBAL COMPETITION REVIEW (Oct. 9, 2009).

enforcement authority from disclosing either the identity of the amnesty/immunity applicant or any of the information it provides to *anyone* – including a foreign government with whom the enforcement authority may have a formal MLAT or bilateral antitrust cooperation agreement.[135] The only way a receiving authority may disclose such information is pursuant to a waiver by the applicant, and only to the extent that the applicant authorizes.[136] However, it has become common for applicants to execute cross-waivers to jurisdictions where they have already received conditional amnesty/immunity.

For example, if a company applied for and received conditional amnesty/immunity from the U.S. DOJ and the Canadian Bureau of Competition, respectively, it will generally (but not always) grant a waiver to the U.S. DOJ to share information with the Canadian Bureau of Competition, and vice-versa (*i.e.*, a cross-waiver). If, however, the company had not yet provided sufficient evidence to the European Commission to qualify for conditional immunity, it would not grant a waiver to either the U.S. DOJ or the Canadian Bureau of Competition to share information with the European Commission. If it also received conditional immunity from the EC, at that point the company may grant a waiver to the U.S. DOJ to share information with the EC and vice versa (one cross-waiver), and a waiver to the Canadian Bureau of Competition to share information with the European Commission and vice-versa (a second cross-waiver). The point is that a company will not grant a waiver to share information with a jurisdiction in which it does not already have immunity because it would be providing the evidence of violation without getting any credit for providing it, and therefore potentially jeopardizing its receipt of immunity in that jurisdiction. The receiving jurisdiction would view the information as evidence already in its possession prior to being provided by the immunity applicant, and the immunity applicant would not get credit for it. A related point is that a company will not grant a waiver to share information with a jurisdiction in which it does not anticipate being prosecuted. For example, if a company did not anticipate being prosecuted in Mexico, and therefore did not have the incentive to apply for immunity there, one could expect that it would not grant a waiver to any jurisdiction to provide the information to Mexico.

These cross-waivers by amnesty applicants permit enforcement agencies to exchange crucial substantive evidence and large amounts of it – all of which is done on an informal basis. In fact, reciprocal cross-waivers by amnesty applicants have resulted in exchanges of far greater volumes of information than have ever been exchanged pursuant to formal agreements.

All of these discussions and exchanges are facilitated by the relationships developed in enforcement agency working groups, particularly the International Competition Network

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[135] *See* Hammond, *Recent Developments I*, at 14.

[136] The waivers generally allow the exchange of information, but often do not permit exchange of documents, because of potential discovery implications in various jurisdictions.

(ICN).[137] The meetings and work of these groups provide valuable opportunities for enforcers to develop relationships and encourage cooperation among jurisdictions. Enforcers have been meeting to discuss investigating and prosecuting cartels since 1999, but in 2004 they began meeting under the auspices of the ICN and its Cartel Working Group. The Cartel Working Group has taken on a vigorous life of its own, hosting meetings of scores of cartel enforcers to discuss common issues relating to anti-cartel enforcement, and issuing reports and guidance on such topics as leniency, electronic evidence gathering, and obstruction.[138] One of its most recent reports focused directly on the subject of cooperation among enforcement agencies.[139]

Regional forums also help foster relationships and cooperation. In early May 2005, for example, Japan and Indonesia co-hosted the 2nd East Asia Conference on Competition Law and Policy, as well as a new Top Level Officials Meeting for competition officials to discuss competition policy. The two conferences included representatives from co-hosts Japan and Indonesia, as well as Taiwan, Malaysia, the Philippines, Singapore, South Korea, Taiwan, Thailand and Vietnam.[140]

Although the bulk of recent activity has been in informal exchanges, there have also been some recent developments in formal agreements. In September 2008, South Korea and the European Commission entered into a formal agreement which involves sharing the results of antitrust investigations and conducting joint probes into alleged cartel behavior.[141] The KFTC also indicated its interest in entering similar arrangements with China, Japan, and the U.S. in its

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[137] The ICN has an excellent web site on which it posts the various resources it has developed relating to anti-cartel enforcement and other competition-related topics, at http://www.internationalcompetitionnetwork.org. The Organization for Economic Co-operation and Development (OECD) is another forum through which enforcement agencies share information and develop best practices; the OECD's web site also contains a number of resources relating to anti-cartel enforcement, at http://www.oecd.org/topic/0,2686,en_2649_37463_1_1_1_1_37463,00.html.

[138] Hammond, *Recent Developments I*, at 17 ("[The annual ICN Cartel Workshop] provides a venue for anti-cartel enforcers from around the world to come together, learn from each other and develop close working relationships that serve as the basis for future cooperation.").

[139] International Competition Network, Cartel Working Group, *Co-operation Between Competition Agencies In Cartel Investigations* (May 2006).

[140] *See* Fair Trade Commission of Japan, Press Release, *East Asian Conferences On Competition Policy Held In Bogor* (Apr. 27, 2005).

[141] *KFTC and DG Comp to Cooperate on Cartels*, GLOBAL COMPETITION REVIEW (Sept. 3, 2008).

attempt to increase its antitrust enforcement capabilities.[142] In late 2004, the U.S. and Canada signed a positive comity agreement that builds upon a 1995 comity agreement between the two countries. The new agreement establishes guidelines for the circumstances under which requests for positive comity can be made and the procedures for making such requests.[143] The U.S. has also entered into antitrust cooperation agreements with Australia, Brazil, Canada, the EU, Germany, Israel, Japan, and Mexico. The European Union has entered into separate Memoranda of Understanding with China that will enable the parties to engage in dialogue designed to strengthen cooperation in the enforcement of their competition laws.[144] The EU has similar agreements with the U.S., Canada, and Japan. The EU's modernization regulation created the European Competition Network, a framework within which EU member states can exchange information.[145] Norway, Denmark, Iceland, and Sweden are parties to a cooperation agreement that enables them to exchange confidential information regarding cartels, mergers, and abuse of dominant positions.[146] Japan has entered into cooperation agreements with the United States, Canada, and the EU to allow for information exchanges and broader cooperation on antitrust investigations. Canada and Korea also recently entered into an antitrust cooperation agreement.

All of these agreements and relationships demonstrate that international cooperation is increasingly the norm, not the exception, in international cartel investigations, and that worldwide coordinated investigations are clearly the wave of the future.[147]

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[142] *See id.*

[143] *See* U.S. Department of Justice, Press Release, *U.S. And Canada Sign Agreement To Provide For Enhanced International Antitrust Cooperation* (Oct. 5, 2004); Competition Bureau, Information Notice, *Canada And The U.S. Sign Cooperation Agreement On Competition Law Enforcement* (Oct. 5, 2004).

[144] *See* European Commission, Press Release, *EU-China Agree Terms For Bilateral Competition Dialogue* (May 6, 2004).

[145] For more information on the European Competition Network, see Emil Paulis, *International Co-Operation Against Cartels*, address before the ACCC Cracking Cartels conference (Nov. 24, 2004) (hereinafter "International Co-operation"), at 4-5 . For information on the ECN's work relating specifically to leniency programs, see Gauer and Jaspers, *European Competition Network*. The ECN also has an informative web site, at http://ec.europa.eu/comm/competition/antitrust/ecn/ecn_home.html.

[146] *See Agreement Between Denmark, Iceland And Norway On Co-Operation In Competition Cases*. Denmark, Norway and Iceland entered into the agreement in 2001, and Sweden joined on February 15, 2004.

[147] For a practitioners' discussion of the impact of cooperation, see *2006 GCR Roundtable* at 16-17.

4. Increasingly Aggressive Investigative Techniques

The Antitrust Division has pledged to "use all available investigative tools – such as covert taping, informants, search warrants, and foreign assistance requests – to vigorously investigate cartel conduct."[148] Although simultaneous raids, and even arrests, at locations spread across the globe are becoming both more frequent and more sophisticated among enforcement authorities, the DOJ's Antitrust Division consistently employs the most aggressive investigative techniques to uncover and prosecute international cartels. For example, the Antitrust Division is believed to have secretly videotaped a marine hose cartel meeting in Houston, Texas on May 1, 2007, the day before eight foreign executives were arrested.[149] This footage may have played an important role in convincing five of the foreign executives to plead guilty and accept jail sentences within six months of their initial arrests.

The Antitrust Division has long employed sophisticated surveillance methods to build its cases in international cartel investigations. Indeed, the secret taping of cartel meetings between lysine producers in the early 1990s led to one of the Division's earliest successes in prosecuting an international cartel and resulted in the conviction of five individuals and five companies.[150] While the lysine cartel meetings were taped with the consent and cooperation of an informant, the Antitrust Division is now free to record cartel communications without the use of an informant. In 2006, Congress authorized non-consensual taping of cartel communications pursuant to court-authorized wiretaps and armed the Division with a powerful investigative tool.[151] The sophisticated techniques deployed by the Antitrust Division to pursue international cartels sets it apart from other enforcement agencies.

Another important investigative technique employed by the Antitrust Division is to file criminal complaints under seal. Filing a criminal complaint under seal enables the Division to arrest foreign individuals upon entry into the United States, without jeopardizing the secrecy of

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[148] Hammond, *Recent Developments I*, at 7; *see also* Hammond, *Beating Cartels at Their Own Game*, ("If we are to deter it, if we are to detect it, if we are to punish it, then we must use every investigative tool available to law enforcement.").

[149] *See DOJ Targets British Hose Cartelists*, GLOBAL COMPETITION REVIEW (Dec. 4, 2006) (quoting Dan McInnis with Akin Gump Strauss Hauer & Feld as stating "There was an original insider, who let the DOJ tape one of the meetings.").

[150] The Antitrust Division's public release of snippets of lysine cartel meeting video and audio tapes obtained during an investigation provides a rare peek into the inner-workings of a cartel. *See* Scott D. Hammond, *Caught in the Act: Inside an International Cartel*, address to the OECD Competition Committee (Oct. 18, 2005). The lysine investigation also uncovered international cartels among producers of citric acid, sodium gluconate, sodium erthorbate, and maltol.

[151] *See* 18 U.S.C. § 2516.

an ongoing investigation. For example, Belgian national Marc Smet was arrested at a trade convention in Honolulu, Hawaii on October 14, 2003 based on a criminal complaint filed under seal in the U.S. District Court of Virginia on October 8, 2003.[152] The underlying investigation of companies that moved and shipped household goods for the Department of Defense continued into 2006 and resulted in six companies paying more than $10 million in corporate fines.[153] By filing a criminal complaint under seal, the Division was poised to arrest Smet whenever he next entered the country without alerting the foreign or domestic targets of the investigation. Filing criminal complaints under seal has now become the common practice of the Division in international cartel matters.

The Division frequently coordinates with other domestic investigative agencies. For example, the marine hose investigation was jointly conducted by the Antitrust Division, the Federal Bureau of Investigation, the Defense Criminal Investigative Service of the Department of Defense's Office of Inspector General, and the U.S. Navy Criminal Investigative Service.[154] In addition, the above-mentioned 2003 investigation of companies transporting military household goods that culminated in the arrest of Marc Smet was jointly conducted by the Antitrust Division, the Defense Criminal Investigative Service, the Defense Criminal Investigative Service, and the Army Criminal Investigative Command.[155] Communication and coordination between domestic and international enforcement agencies is at an all-time high.

5. Increased Focus On And International Cooperation With Respect To Interference With The Investigatory Process

A notable development over the past few years is the increasing attention paid by the enforcement community to conduct that interferes with an enforcement agency's investigatory process. Although obstruction of justice prosecutions related to witness tampering or destroying, changing, or removing documents should surprise no one, this has become an area of increased enforcement focus for the Antitrust Division in the U.S., and for other jurisdictions as well.[156]

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[152] U.S. Department of Justice, Press Release, *Belgian Moving and Storage Company and Top Executive Charged with Bid Rigging and Defrauding the U.S. Government* (Oct. 16, 2003).

[153] U.S. Department of Justice, Press Release, *Southern California Freight Co. Pleads Guilty to Making False Statements Related to Military Moving Program* (Sept. 27, 2006).

[154] U.S. Department of Justice, Press Release, *Three United Kingdom Nationals Plead Guilty To Participating In Bid-Rigging Conspiracy In The Marine Hose Industry* (December 12, 2007).

[155] U.S. Department of Justice, Press Release, *Belgian Moving and Storage Company and Top Executive Charged with Bid Rigging and Defrauding the U.S. Government* (Oct. 16, 2003).

[156] The heads of several major enforcement agencies have made it clear that preventing and prosecuting obstruction of the investigatory process is a top priority. *See, e.g.*, Barnett, *Seven Steps*; Samuel, *Key Developments*; MacKenzie, *Enforcers Sans Frontiers*. *See also* R.

[Footnote continued on next page]

In the past few years, the DOJ has prosecuted several companies and individuals who took steps to destroy documents, influence witnesses, or remove relevant documents from the U.S. Recently, the DOJ successfully prosecuted an attorney in Puerto Rico for obstructing an Antitrust Division investigation; after his conviction at trial, he was sentenced to 33 months in prison.[157]

Notably, the DOJ has also pursued criminal convictions of foreign companies for improper document destruction or document tampering – even if the company did not directly participate in any other alleged wrongdoing.

In March 2002, Toho Tenax Co. Ltd. (Toho Japan) of Tokyo, Japan, was indicted for obstruction of justice because it caused incriminating documents to be secretly removed from the headquarters of Toho USA in California and sent to Tokyo while a grand jury investigation was active in the U.S.. The documents were later discovered by Japanese law enforcement agents who found them during a search of the Toho Japan headquarters *at the U.S. DOJ's request*.

In 2002 and 2003, the Division filed multiple obstruction of justice charges against The Morgan Crucible Company plc of the United Kingdom, its U.S. subsidiary Morganite, Inc., the former Chief Executive Officer of Morgan Crucible, Ian Norris, and three other executives and employees of Morgan Crucible and related companies. In an indication of the importance the Antitrust Division places on pursuing such matters, former Assistant Attorney General Pate has described the Morgan Crucible prosecution in some detail:

> In one recent investigation, we uncovered an elaborate plot to obstruct not only our investigation of price fixing in the carbon brush industry but also a potential EC investigation. Executives of Morgan Crucible gave the Division false information in an attempt to convince us that their price-fixing meetings with

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Hewitt Pate, *The DOJ International Antitrust Program – Maintaining Momentum,* address before the ABA Section of Antitrust Law 2003 Forum on International Competition Law (Feb. 6, 2003) (expressing the Antitrust Division's "firm resolve to prosecute conduct that interferes with our cartel investigations, regardless of the nationality of the firm involved or where the acts of obstruction took place. With increased frequency, the Division is uncovering evidence of obstruction of justice, and we will aggressively investigate such conduct. In the last two and one-half years alone, the Division has brought five cases charging obstruction of justice -- a high number by historical standards. There are a number of other cases where we have not brought obstruction charges separately but instead obtained sentencing enhancements based on the obstruction."). The ICN's Cartel Working Group also recently issued a report on obstruction, highlighting its importance to enforcement agencies. *See* International Competition Network, *Cartel Working Group*, Obstruction of Justice in Cartel Investigations (May 2006).

[157] *See* U.S. Department of Justice, Press Release, *Puerto Rico Attorney Sentenced to 33 Months in Prison for Obstruction of Justice* (Aug. 15, 2006).

> competitors were legitimate business meetings. They provided their co-conspirator with a written 'script' containing this false information, requested that it follow the script when questioned by the Division, and warned its co-conspirator that if the U.S. investigation proceeded, the price-fixing investigation would spread to the EC. The Division charged The Morgan Crucible Company PLC, a British firm, with obstruction of justice arising from this witness tampering. Morgan Crucible pled guilty to the obstruction charges and its U.S. subsidiary, Morganite, Inc., pled guilty to price fixing. The companies were fined a total of $11 million.[158]

This increased focus on obstruction of justice is complemented in the U.S. by the Sarbanes-Oxley Act of 2002, which increases the penalties for actions taken to frustrate a U.S. government investigation. The Sarbanes-Oxley Act makes it a crime – subject to fines and *imprisonment for up to 20 years* – to knowingly alter or destroy any document with the intent to impede, obstruct, or *influence* the investigation of any matter within the jurisdiction of a department or agency of the United States or "*in relation to or contemplation of* any such matter."[159] While the sanction for violating this statute is clearly severe, the phrases "*influence*" and "*in relation to or contemplation of any such matter*" leave much to interpretation. There is a wide range of views on how broad §1519 actually is, and it is unclear how courts will interpret it. However, there is abundant clarity that the Antitrust Division will pursue parties that interfere with its investigatory process.

The U.S. is not the only jurisdiction pursuing companies for interfering in investigations. The Canadian Competition Bureau also charged Morgan Crucible with obstruction of justice.[160] The company's Canadian affiliate, Morganite Canada Corp., was charged for its role in implementing the underlying price-fixing conspiracy in Canada.[161] In late April 2005, the KFTC announced that it might seek to impose a fine against Samsung Total Petrochemicals Co., a joint venture between the Samsung Group and Total SA, for withholding documents during a raid by the KFTC of the company's offices conducted as part of a price-fixing investigation.[162]

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[158] Pate, *Anti-Cartel Enforcement.*

[159] 18 U.S.C. § 1519 (emphasis added).

[160] Competition Bureau, Press Release, *Morgan Companies Fined $1 Million For Obstruction And Price Fixing* (July 16, 2004).

[161] *Id.*

[162] *See Samsung Total May Get Heavier Fines For Hindering Cartel Probe*, ASIA PULSE (Apr. 28, 2005).

6. The New Specter Of Extradition

One of the newer and potentially one of the most powerful weapons in the DOJ's arsenal is the extradition of foreign nationals. Until recently, extradition simply was not a driving issue in making The Decision, but recent actions by the U.S. DOJ suggest that this is changing.

The limited threat of extradition to this point has led some corporate cartel participants – indeed, in the authors' estimate, entire cartels – to gamble that they are safe within their home borders by not self-reporting or by not responding to charges in another jurisdiction. Even in situations where the companies that participated in a cartel agree to plead guilty to criminal charges, and even where there are powerful incentives (both positive and negative) for individual executives to submit to the jurisdiction of the United States, accept responsibility, and plead guilty – particularly in the form of very significant restrictions on their travel due to a combination of the use of Interpol Red Notices to apprehend defendants when they cross any one of hundreds of borders and immigration relief from those restrictions for individuals that plead guilty – a small number of foreign executives still decide to take their chances and become international fugitives. Executives from the rubber chemicals, sorbates, isostatic graphite, and nucleotides cartels, for example, all refused to submit to the jurisdiction of the U.S. and plead guilty alongside their employers, exposing themselves to the full range of sanctions and limiting themselves to a very short list of places to which they could travel.

However, recent developments place the DOJ significantly closer to closing the door on the "international fugitive option" whenever possible. In February 2010, the DOJ's first effort to extradite an individual from another country to face prosecution in connection with an antitrust offense in the U.S. proved successful. In 2004, the DOJ revealed in a U.S. federal court filing that it was seeking to extradite from the U.K. Ian Norris, a U.K. citizen and the former chief executive officer of Morgan Crucible PLC.[163] Norris had previously been indicted for his role in price-fixing in the carbon brush industry and in Morgan Crucible's subsequent obstruction of the DOJ's investigation.[164] However, he has remained outside of the U.S. to avoid prosecution. On January 13, 2005, Norris was arrested in the U.K. and charged with nine counts of price-fixing and obstruction of justice. On June 1, 2005, the Bow Street Magistrates' Court ruled that the alleged price-fixing was an extraditable offense and that Norris could therefore be extradited, and referred the matter to the U.K.'s Home Secretary. In late September 2005, the Home Secretary approved the extradition request. But after a lengthy appeals process, the U.K.'s highest court ruled in March 2008 that Norris could not be extradited for the price-fixing

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[163] *See* Government's Memorandum of Law in Support of Its Motion to Intervene and for a Limited Stay of Discovery, *In Re: Electrical Carbon Products Antitrust Litigation* (MDL No. 1514), at 2.

[164] *See* Second Superseding Indictment, *United States v. Ian P. Norris*, No. CR 03-632 (E.D. Pa.. Sept. 28, 2004).

offense.[165] The House of Lords held that extradition was improper because price-fixing was not a criminal offense in the U.K. at the time of Norris's alleged offense.[166] However, the Lords referred the case back to a magistrate's court to rule on whether the obstruction of justice charge constituted an extraditable offense. In July 2008, the magistrate's court ruled that extradition to the U.S. was warranted based on the gravity of the allegations made against Norris.[167] In May 2009, Norris lost his appeal of the magistrate's extradition ruling in the U.K. High Court.[168] And on February 24, 2010, the U.K. Supreme Court, the successor to the House of Lords as the U.K.'s highest appellate court, unanimously dismissed Norris's appeal of the lower court decision that had found him extraditable on the charge of obstruction of justice.[169] Moreover, even if the U.K. courts had not ruled that extradition was warranted, the price-fixing ruling by the House of Lords would still offer little protection to future targets for extradition because the U.K.'s Enterprise Act made price-fixing a criminal offense in 2003.

The DOJ's confidence in its ability to extradite foreign executives from the U.K. became apparent in December 2007 when three U.K. executives were escorted by U.S. officials to the U.K. after pleading guilty in a U.S. court to price-fixing in the marine hose industry. Peter Whittle, Bryan Allison, and David Brammar were among the eight foreign executives arrested in the United States on May 2, 2007 in connection with the marine hose investigation. On December 12, 2007, the three U.K. nationals pled guilty before a U.S. District Court in Houston,

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[165] *Lords halt Norris extradition*, GLOBAL COMPETITION REVIEW (Mar. 12, 2008).

[166] *Id*. Norris narrowly avoided extradition for his pre-Enterprise Act behavior. Before succeeding in the House of Lords, Norris first lost his appeal before a two-judge panel of the U.K.'s High Court on January 25, 2007, but his extradition order was stayed by the House of Lords when the U.K.'s highest court agreed to hear Norris's appeal on June 7, 2007. Nikki Tait, *Lords To Hear Extradition Case*, FINANCIAL TIMES (June 7, 2007); Nikki Tait, *High Court Upholds Extradition Antitrust Charges*, FINANCIAL TIMES (Jan. 26, 2007). For further details on the Ian Norris matter, see Hammond, *Charting New Waters*, at 10-12; and Julian M. Joshua, *Extradition: The DOJ's New Foreign Policy Weapon*, address before the ABA Section of International Law 2005 Fall Meeting (Oct. 26, 2005).

[167] *Norris Faces Extradition to US Again*, GLOBAL COMPETITION REVIEW (July 25, 2008).

[168] Frances Gibb & Michael Herman, *Norris Facing Extradition After Losing Latest Appeal*, The Times Online, May 15, 2009, http://business.timesonline.co.uk/tol/business/law/article6295635.ece

[169] U.K. Supreme Court, Press Summary, *Norris (Appellant) v Government of the United States of America (Respondent)*, February 24, 2010, http://www.supremecourt.gov.uk/docs/UKSC_2009_0052_ps.pdf; *see also* UK Ex-CEO Loses Extradition Fight In Price-Fixing Case, GLOBAL COMPETITION REVIEW (February 24, 2010).

Texas.[170] The plea agreements both permitted the defendants to return to the U.K. to cooperate with the OFT's investigation and deferred sentencing until after the defendants pled guilty and served any resulting prison sentence in the U.K.[171] After pleading guilty in the United States, the three defendants were escorted to the U.K. and charged with criminal price-fixing charges upon their arrival at Heathrow airport.[172] The defendants agreed to serve significant prison sentences in the United States – Whittle agreed to serve 30 months in prison, Allison agreed to serve 24 months in prison, and Brammar agreed to serve 20 months in prison.[173]

The plea agreements recommend, however, that defendants receive credit against the recommended sentences for any time served in a U.K. prison.[174] The plea agreements also required defendants to waive any right to oppose extradition and conditions the plea agreement upon not contesting an extradition request.[175] In addition, the DOJ's willingness to release

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[170] U.S. Department of Justice, Press Release, *Three United Kingdom Nationals Plead Guilty To Participating In Bid-Rigging Conspiracy In The Marine Hose Industry* (December 12, 2007).

[171] Plea Agreement, *United States v. Whittle*, No. H-07-487-03 (S.D. Tex. Dec. 12, 2007); Plea Agreement, *United States v. Allison*, No. H-07-487-01 (S.D. Tex. Dec. 12, 2007); Plea Agreement, *United States v. Brammar*, No. H-07-487-02 (S.D. Tex. Dec. 12, 2007). The plea agreements elaborated that any return to the United Kingdom was conditioned upon being escorted by U.S. officials, arrested at Heathrow Airport, and interviewed by the OFT. Only then would the defendants be released on bail subject to surrendering passports, reporting regularly to a police station, and abiding by no travel requirements. *See, e.g.,* Plea Agreement, *United States v. Whittle*, No. H-07-487-03 (S.D. Tex. Dec. 12, 2007), at ¶11.

[172] Michael Peel, *Price-fix Case Trio To Appear In Court*, FINANCIAL TIMES (Dec. 20, 2007). The criminal charges against Whittle, Allison, and Brammar marks the first prosecution under the U.K.'s Enterprise Act 2002 which criminalized price-fixing in the U.K. *Id*.

[173] Although the defendants initially received longer sentences in the U.K., the U.K. Court of Appeals reduced their sentences to conform to those agreed upon by the defendants in the United States. *See Court Shrinks Sentences of Marine Hose Three*, GLOBAL COMPETITION REVIEW (Dec. 1, 2008).

[174] Plea Agreement, *United States v. Whittle*, No. H-07-487-03 (S.D. Tex. Dec. 12, 2007), at ¶16 ("[T]he United States and the defendant agree to recommend to this Court . . . that the period of imprisonment recommended . . . be reduced by one day for each day of the total term of the sentence of imprisonment imposed upon the defendant following his conviction for the U.K. cartel offense."); *see also* Plea Agreement, *United States v. Allison*, No. H-07-487-01 (S.D. Tex. Dec. 12, 2007); Plea Agreement, *United States v. Brammar*, No. H-07-487-02 (S.D. Tex. Dec. 12, 2007).

[175] Plea Agreement, *United States v. Whittle*, No. H-07-487-03 (S.D. Tex. Dec. 12, 2007), at ¶13 ("[T]he defendant waives any right to, and agrees not to, oppose or contest, on any grounds,

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criminal defendants into foreign custody indicates confidence that efforts to extradite these individuals to enforce their prison sentences would be successful.

The result in the Norris case demonstrates not only the DOJ's commitment to pursuing and prosecuting culpable individuals outside U.S. borders, but that hiding – not an attractive option to begin with – will be even more unpalatable for non-U.S. nationals. The increasing risk of extradition may be contributing to foreign individuals submitting to U.S. jurisdiction in larger numbers and serving longer prison sentences than ever before.[176]

7. The EC's New Settlement Procedure

On June 30, 2008, the EC formally introduced its new procedure for settlement of cartel cases.[177] The overriding principle of the settlement procedure is that parties do *not* have an automatic right to settle their case and the EC will retain full discretion throughout the process to pursue the standard procedure. This means that until a final decision is taken it is possible (although in practice unlikely) for the College of Commissioners to depart from a recommendation of the EC's services for settlement. To date, no cases have been resolved through the settlement procedure and in our view it is likely that most cases will not be deemed suitable for resolution through that process.

In the event, however, that the EC exercises its discretion to introduce and pursue a settlement agreement in a particular case, the relevant steps in the process are as follows:

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including, but not limited to, his prosecution or conviction of the U.K. cartel offense, any request for extradition made by the United States to face charges."); *see also* Plea Agreement, *United States v. Allison*, No. H-07-487-01 (S.D. Tex. Dec. 12, 2007); Plea Agreement, *United States v. Brammar*, No. H-07-487-02 (S.D. Tex. Dec. 12, 2007).

176 *See* Hammond, *Recent Developments I*, at 6 ("From 2000 through 2005, the average prison sentence imposed on foreign nationals in international cartel cases was between three and four months. The average prison sentence for foreign defendants in international cartel cases rose to approximately seven months in FY 2006 and then to 12 months in FY 2007.").

177 The new procedure is set out in two documents: (1) Commission Regulation No. 622/2008 amending Regulation 773/2004 ("Settlement Regulation") and (2) a Commission Notice on the Conduct of Settlement Procedures In View of the Adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation No. 1/2003 in Cartel Cases ("Settlement Notice"). On the same date, the EC also published a "*Q&A*" document about the settlement procedure. *See Antitrust: Commission introduces settlement procedures for cartels – frequently asked questions* ("Q&A")

Step 1: The EC decides (based on a number of factors) whether the case is one which is suitable for settlement.[178] It will then initiate proceedings and set a time-limit of at least two weeks within which parties must provide written confirmation that they are interested in engaging in settlement discussions.[179]

Step 2: Parties that have expressed an interest in settlement then engage in bilateral discussions with the EC and will be given restricted access to its file so they can see the evidence on which the EC bases its objections and potential fines.[180] Parties will not have access to the entire file and, therefore, must expect that the EC will only disclose its strongest evidence. (The potential substance of these bilateral discussions will be addressed below).

Step 3: When, and if, the parties reach a "common understanding" as to the scope of the EC's potential objections and the estimation of the range of likely fines is reached, each party will have at least 15 working days to submit a final settlement submission, which may be written or oral.[181] Most importantly, this submission must contain *a clear and unequivocal acknowledgement of the party's liability* and an indication of the maximum amount of the fine the party is prepared to pay.[182]

Step 4: The EC will issue a "streamlined" Statement of Objections, which will reflect the parties' settlement submissions. The parties must then reply in writing to the Statement of Objections within at least two weeks, confirming that it corresponds to the content of their settlement submissions and that they remain committed to following the settlement procedure.[183]

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[178] The factors that the EC will consider are: (1) the probability of reaching a common understanding with the parties involved within a reasonable time frame; (2) the number of parties involved; (3) conflicting positions on liability; (4) contestation of the facts, and (5) the setting of a possible precedent. *See* Settlement Notice, ¶ 5.

[179] *See id.*, ¶ 11.

[180] *See id.*, ¶ 16.

[181] In practice, particularly where multiple parties are engaged in settlement negotiations in the same case, the process should be expected to take far longer than 15 days.

[182] *See id.*, ¶¶ 17, 20.

[183] *See id.*, ¶ 26. Assuming the Statement of Objections does reflect the "common understandings," the reply is envisioned to be nothing more than a confirmation of those two facts. If a party fails to do this, the Settlement Notice cryptically notes that "the Commission

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Step 5: The EC will adopt its decision and, in setting the amount of the fine, will apply a reduction of 10% (imposed on the final amount of fine calculated and after the 10% of turnover cap on fines has been applied). This set level of reduction will be the same for each of the parties that complete the settlement procedure, and will be added to any reduction granted under the Leniency Notice. The EC will also (at the earlier stage of fine calculation) limit any multiplier imposed on a settlement party to a factor of two.[184]

As noted before, to date, there have been no settlements reached by the EC using this procedure, so there is still no precedent to determine how it will work in practice. When the procedure was initially announced for comment in October 2007, several commentators criticized the procedure because, among other things, it did not provide substantial benefits—indeed, a mere 10% fine reduction—in exchange for the burdens (*i.e.*, unequivocal admission, loss of procedure right to a full hearing, lack of access to entire file, etc.).[185] This scepticism concerning the benefits of the settlement procedure was heightened due to the EC's representation that the settlement procedure does not "give companies the ability to negotiate with the Commission as to the existence of the infringement of Community law *or the appropriate sanction*."[186] If that statement were taken literally, it would be rare for a company to conclude that the settlement process afforded greater benefits than burdens.

In reality, however, the EC has indicated that parties will have the ability to "influence" the potential dispositions of cartel cases significantly through the settlement process.[187] To be sure, the EC will not engage in negotiations concerning whether there was an infringement of Community law. However, the Settlement Notice states that the EC should "ensure" that the parties' "are afforded the opportunity effectively to make known their views on the truth and

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will take note of the party's breach of its commitment and may also disregard the party's request to follow the settlement procedure."

[184] *See id.*, ¶¶ 28, 32-33

[185] *See, e.g.*, *Joint Comments of the ABA Section of Antitrust Law and Section of International Law in Response to the Commission of the European Communities' Request for Public Comment on the Draft EU Settlement Procedures* (Dec. 2007), *available at* http://www.abanet.org/antitrust/at-comments/2007/12-07/Comments-EUDraftSettleProc.pdf (hereinafter "ABA December 2007 Comments"), at 20.

[186] *See* Q&A at 1.

[187] *See id.* ("The Commission will not bargain about evidence or its objections, however, parties will also be heard effectively in the framework of the settlement procedure and parties will therefore have the opportunity to influence the Commission's objections through argument.")

relevance of the facts, objections and circumstances" put forward by the EC.[188] Additionally, the Settlement Notice also notes that the settlement procedure "will enable the parties effectively to assert their views" regarding the "*facts alleged*, the classification of those facts, *the gravity and duration of the cartel*, the attribution of liability, *an estimation of the range of likely fines*, as well as the evidence used to establish the potential objections.[189] In other words, although successful participation in the settlement procedure only guarantees you a 10% reduction on any fine, it provides the parties the far more valuable opportunity to influence the underlying amount of the fine in the first instance—certainly a substantial benefit to settling parties and a strong incentive for companies to consider the settlement procedure. Put differently, although the EC cannot enter into plea negotiations like the Department of Justice in U.S. can, the EC's settlement procedure may end up having a similar impact on the fines ultimately imposed, depending on how it is implemented in practice.

In addition to these potential benefits, there are a number of important protections for parties engaged in the EC's new settlement procedure. As an initial matter, *settlement submissions may be submitted to the EC orally*.[190] This substantially reduces the risk that submissions made under this process could then be obtained and used against participants in other proceedings, especially civil litigation. Similarly, the EC has clarified that *only limited access to such submissions will be granted to third parties*. Access will only be granted to those addressees of a Statement of Objections who have not requested settlement. Even then, access is limited to the Commission's premises and parties are not allowed to make any mechanical copies or to use the information other than for their defence in administrative or judicial procedures where Community competition rules are in issue.[191]

Although the submissions and acknowledgements made during the settlement procedure are protected from disclosure to third parties, as is the Statement of Objections, the EC will still adopt a formal decision at the end of the settlement procedure setting out the infringement and imposing fines on the settling parties.[192] That decision has the same legal authority as is one entered through the standard procedure and can be relied on in private damages actions. Consequently, settling parties must be wary that they will be in a worse position with regard to follow-on private actions than non-settling parties. This is because a settling party's "admission" of liability and representations concerning the maximum fine the party is prepared to pay will be reflected either directly or indirectly in the Commission's decision for use by civil plaintiffs. Thus, participants in the settlement procedure must be careful about the acknowledgements they

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[188] Settlement Notice, ¶ 4.

[189] *See id.*, ¶ 16 (emphases added).

[190] *See id.*, ¶ 38.

[191] *See id.*, ¶ 35.

[192] *See id.*, ¶ 28.

make, just as they might in negotiating plea agreements in the U.S. with the Department of Justice.

Beyond protections from third parties and civil litigants, the parties are also protected from having submissions used by the EC. If at any point in the process the settlement procedure is terminated by the EC, the submissions and acknowledgements provided by the parties cannot be used against them and the EC must revert to its standard procedure.[193] A new Statement of Objections would most likely be issued and the company would have a new opportunity to submit its defence, this time with full access to the file and the right to a hearing.

Time will tell whether or not this new settlement procedure will be effective in accelerating the time within which the EC is able to resolve a significant number of cartel cases. The benefits of settlement remain somewhat uncertain, however, the EC has provided for the possibility of large incentives for participation while limiting the potential costs in terms of disclosure of discussions and acknowledgements. As a result, in those cases where settlement is available, parties should give careful consideration to the potential benefits, burdens, and collateral consequences of pursuing that process.

V. The United States Leniency Policy And International Cartels: A Brief History And Primer

A. The U.S. Leniency Program

The Antitrust Division's original Corporate Leniency Policy was initiated in October 1978.[194] Under this policy, amnesty was available only to organizations that came forward before the Division had initiated an investigation, and the grant of amnesty was dependant on prosecutorial discretion and was not automatic.[195] The policy was far from an overwhelming success, despite attracting an initial flurry of interest.[196] In the fourteen and a half years before the policy was revised in 1993, a total of only 17 corporations applied for amnesty, and only ten

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[193] *See id.*, ¶ 29.

[194] *See* John H. Shenefield, *The Disclosure Of Antitrust Violations And Prosecutorial Discretion*, address before the 17th Annual Corporate Council Institute (Oct. 4, 1978).

[195] *See* Prosecutorial Amnesty – "Whistleblowing Conspirators," 4 Trade Reg. Rep. (CCH) ¶ 13,112 (Aug. 16, 1994).

[196] Then-Assistant Attorney General Anne Bingaman, when announcing the revisions to the program in 1993, called it only "somewhat successful." Anne K. Bingaman, *Some Initial Thoughts And Actions*, address Before the ABA Section of Antitrust Law (Aug. 10, 1993), at 65 Antitrust & Trade Reg. Report 250 (Aug. 12, 1993) (hereinafter "Some Initial Thoughts").

received amnesty.[197]

In light of these numbers, the Division determined that the policy's lack of certainty and transparency was a disincentive for companies to report their activities. In 1993, in order to correct these problems and provide additional incentives for companies to come forward and cooperate, Assistant Attorney General Bingaman unveiled a new Corporate Amnesty Policy that was revised in three major respects.[198]

First, the policy was changed to ensure that amnesty is automatic if there is no pre-existing investigation. That is, if a company comes forward prior to an investigation and meets the program's requirements, the grant of amnesty is certain and is not subject to the exercise of prosecutorial discretion.[199]

Second, the Division created an alternative amnesty, whereby amnesty is available even if cooperation begins after an investigation is underway.[200]

Third, the revised policy made it clear that if a company qualifies for automatic amnesty, then all directors, officers, and employees who come forward with the company and agree to cooperate also receive automatic amnesty. In addition, executives of a company seeking amnesty after an investigation has begun will be given serious consideration for lenient treatment – in the form of individual amnesty or individual immunity – in exchange for their full cooperation.[201]

The Division seized every available opportunity to educate the bar and the business community on the merits of the program, and, more importantly, built a solid record of applying the program consistently and fairly.[202] At various points over the decade and one-half between

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[197] *See* Gary R. Spratling, *The Experience And Views Of The Antitrust Division*, address before the United States Sentencing Commission Symposium, "Corporate Crime in America: Strengthening the 'Good Citizen' Corporation" (Sept. 8, 1995) (hereinafter "The Experience and Views of the Antitrust Division").

[198] *See* Bingaman, *Some Initial Thoughts*.

[199] *See* U.S. Department of Justice, Antitrust Division, *Corporate Leniency Policy,* Aug. 10, 1993, Part A (hereinafter "DOJ Corporate Leniency Policy").

[200] *See id.*, Part B.

[201] *See id.*, Part C.

[202] Then-Deputy Assistant Attorney General Gary Spratling, one of the authors of this paper, gave a number of speeches that touted the policy. *See*, *e.g.*, Anne K. Bingaman and Gary R. Spratling, *Criminal Antitrust Enforcement*, joint address before the Criminal Antitrust Law

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1993 and 2008, the Division also made important clarifications to critical features of the policy,[203] such as defining the qualification criterion "not a leader or originator," confirming that it would not disclose to foreign antitrust agencies information obtained from an amnesty applicant, and assuring that the scope of the amnesty protection would be expanded to cover more extensive conduct discovered during the course of the applicant's internal investigation, each discussed below. On November 19, 2008, the Division issued a comprehensive and updated resource on recurring issues in the implementation of the Division's leniency program, titled Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters ("FAQs").[204] The FAQs both restate guidance from prior leniency policy statements, such as the foregoing examples, and address new issues that have arisen since those prior statements were issued, such as detailing the standard for obtaining a marker, declaring that an applicant must admit its participation in a criminal antitrust violation before receiving conditional immunity, and addressing withdrawal and termination issues in the wake of the Stolt-Nielsen matter,[205] each discussed below.

On November 19, 2008, along with the FAQs, the Division also issued revised model conditional leniency letters for corporations and individuals, and a model conditional leniency

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and Procedure Workshop, ABA Section of Antitrust Law (Feb. 23, 1995); Spratling, *The Experience And Views Of The Antitrust Division*; Gary R. Spratling, *The Corporate Leniency Policy: Answers To Recurring Questions*, address before the ABA Antitrust Section 1998 Spring Meeting (Apr. 1, 1998) (hereinafter "Answers to Recurring Questions"); Gary R. Spratling, *Making Companies An Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy – An Update*, address before the Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust (Feb. 16, 1999) (hereinafter "Corporate Leniency Policy Update"). Assistant Attorney General Anne Bingaman also promoted the policy. *See*, *e.g.*, *Interview: Anne K. Bingaman*, ANTITRUST 8 (Fall 1993); Anne K. Bingaman, *Report From The Antitrust Division, Spring 1994*, address before the ABA Section of Antitrust Law Spring Meeting (Apr. 8, 1994); Anne K. Bingaman, *The Clinton Administration: Trends In Criminal Antitrust Enforcement*, address before the Corporate Counsel Institute (Nov. 30, 1995).

[203] *See* Spratling, *Answers To Recurring Questions*; Spratling, *Corporate Leniency Policy Update*.

[204] *See* United States Department of Justice, Antitrust Division, *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters*, available at www.usdoj.gov/atr/public/criminal/239583.pdf (Nov. 19, 2008) (hereinafter "*Frequently Asked Questions")*.

[205] These developments are discussed below in Points 4-6.

letter to be used when a leniency applicant is the subject of another investigation,[206] also discussed below.

1. Not the Leader or Originator.

Under the U.S. Corporate Leniency Policy, to obtain amnesty before an investigation has begun one must show that "[t]he company did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity."[207] The FAQs reconfirm the DOJ's earlier guidance that the policy disqualifies an amnesty applicant only if it is the singular organizer or the singular ringleader of the cartel activity.[208]

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[206] *See* United States Department of Justice, Antitrust Division, *Model Corporate Conditional Leniency Letter*, available at www.usdoj.gov/atr/public/criminal/239524.htm (Nov. 19, 2008); United States Department of Justice, Antitrust Division, *Model Individual Conditional Leniency Letter*, available at www.usdoj.gov/atr/public/criminal/239526.htm (Nov. 19, 2008).

[207] DOJ Corporate Leniency Policy ¶ A(6). The role-in-the-offense standard for obtaining amnesty under the alternative provisions of Part B of the DOJ policy, which covers situations such as when the DOJ has already initiated an investigation, is more subjective and discretionary. One of the seven conditions that must be met in order to receive amnesty under this Part is that: "The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward." *Id.* ¶ B.7. In making that assessment, "the primary considerations will be how early the corporation comes forward and whether the corporation coerced another party to participate in the illegal activity or clearly was the leader in, or originator of, the activity. The burden of satisfying condition 7 will be low if the corporation comes forward before the Division has begun an investigation into the illegal activity. That burden will increase the closer the Division comes to having evidence that is likely to result in a sustainable conviction." *Id.* *See also* Gerald F. Masoudi, *Cartel Enforcement in the United States (and Beyond)*, address at the Cartel Conference in Budapest, Hungary (Feb. 16, 2007) (hereinafter "Cartel Enforcement"), at 7.

[208] *See Frequently Asked Questions*, at Question 14; Scott D. Hammond, *Recent Developments Relating to the Antitrust Division's Corporate Leniency Program*, address before the ABA Criminal Justice Section's Twenty-Third Annual National Institute on White Collar Crime (Mar. 9, 2009) (hereinafter "Hammond, *2009 White Collar Crime Address*"), at 4-5; *Spratling*, *Answers To Recurring Questions*; Scott D. Hammond, *A Review Of Recent Cases And Developments In The Antitrust Division's Criminal Enforcement Program*, address before the ABA Antitrust Section's 50th Annual Spring Meeting (Apr. 24, 2002) (hereinafter "Hammond 2002 Spring Meeting Address"), at 14 ("[U]nder the Division's program, applicants will only be disqualified from obtaining total amnesty if they are clearly the single organizer or single ringleader of a conspiracy"); *id.* at 14 n.9 ("[I]f there are two ringleaders in a five-firm conspiracy, then all of the firms, including the two leaders, are potentially

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2. Disclosure to Foreign Authorities.

The Division found that almost invariably, when a company was considering whether to report its involvement in international cartel activity, the company raised a concern as to whether the Division would disclose the information it learned to any foreign governments in accordance with the U.S.'s obligations under bilateral antitrust cooperation agreements. The Division weighed the policy concerns on both sides of this issue, and made a determination that it would not disclose to foreign antitrust agencies information obtained from an amnesty applicant unless the amnesty applicant agreed to the disclosure.[209] Guided by the same concerns, the Division reaffirmed this policy unchanged in the FAQs.[210] Notwithstanding this policy, the Division routinely obtains waivers from applicants to share information with another jurisdiction in cases where the applicant has also sought and obtained leniency from that jurisdiction. In addition, the Division need not maintain an applicant's anonymity where the applicant has issued a press release or, in the case of publicly traded companies, has submitted public filings announcing its conditional acceptance into the Corporate Leniency Program.[211]

3. Expanding the Scope of the Conspiracy.

The Division found that companies frequently applied for amnesty before completing their internal investigations in order to ensure their place at the front of the line. As a result, their ongoing internal investigation might uncover anticompetitive activity that was more extensive than the conduct originally reported and that fell outside of the protection of the conditional amnesty letter. For example, they might discover evidence showing that the anticompetitive activity involved more products than originally reported. The Division determined that the amnesty coverage would be expanded to include newly discovered conduct, assuming that the company was providing full, continuing, and complete cooperation, and that the company could meet the criteria for amnesty on the newly discovered conduct.[212] The FAQs confirm the guidance of prior policy statements to this effect, and now clarify that newly discovered conduct that is part of the original conspiracy will typically be incorporated into an addendum to the original leniency letter; "if the newly discovered conduct constitutes a separate conspiracy, the

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eligible for amnesty. Or, if in a two-firm conspiracy, each firm played a decisive role in the operation of the cartel, both firms may qualify for amnesty.").

[209] *See* Spratling, *Corporate Leniency Policy Update*. Virtually every foreign authority with a leniency program has adopted a similar policy. Scott D. Hammond, *Recent Developments I,* at 14.

[210] *See Frequently Asked Questions*, at Question 33.

[211] Hammond, *Recent Developments I*, at 14.

[212] Spratling, *Corporate Leniency Policy Update*.

new leniency protection will be provided in a separate corporate conditional leniency letter."[213]

4. The Standard for Obtaining a Marker.

The Division has long recognized that time is of the essence in making a leniency application: because the Division grants only one corporate leniency per conspiracy, an applicant is in a race with all other potential applicants.[214] In light of the time pressures that an applicant faces in preparing a leniency application, the Division has adopted a marker system to hold a potential amnesty applicant's place in the line for leniency while the applicant gathers more information in support of its application.[215] The FAQs contain the Division's most detailed guidance to date about how the marker system works.[216] Although a marker may be issued prior to completion of the applicant's internal investigation, counsel must, at a minimum: "(1) report that he or she has uncovered some information or evidence indicating that his or her client has engaged in a criminal antitrust violation; (2) disclose the general nature of the conduct discovered; (3) identify the industry, product, or service involved in terms that are specific enough to allow the Division to determine whether leniency is still available and to protect the marker for the applicant; and (4) identify the client."[217] The FAQs emphasize that the evidentiary requirement for a marker is relatively low, encompassing, for example, a comment overheard by an employee about his employer's potential price-fixing activities.[218] Where the Division has already begun investigating the wrongdoing, however, the burden will be higher. The FAQs also provide guidance concerning the duration of the marker. Although a 30-day period for an initial marker is common, the length of time given to the applicant will vary according to the complexity of the internal investigation.[219]

As discussed immediately below, the adoption of the marker system has altered the standard for receiving a conditional leniency letter. Because the marker system currently allows an amnesty applicant to hold its place in line with "some information or evidence" of wrongdoing, more is now required to actually obtain a conditional leniency letter.[220]

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[213] *Frequently Asked Questions*, at Question 7.

[214] *See Frequently Asked Questions,* at Question 2.

[215] *See id.*

[216] Hammond, *2009 White Collar Crime Address*, at 1.

[217] *Frequently Asked Questions,* at Question 2.

[218] *See id.*

[219] *See id.*

[220] *See id.,* at Question 5.

5. An Admission of Criminal Conduct Required for Conditional Leniency.

The FAQs state that the threshold for obtaining a conditional leniency letter is an admission of participation in a criminal antitrust violation.[221] In the authors' experience, this standard brings the stated policy in compliance with the Division's practice as it has evolved over the last couple of years, but it is a higher threshold than required for conditional leniency during the first dozen years of implementation of the Division's revised leniency program. Confirming the higher standard, the Division has instituted two changes in the revised model leniency letters.[222] Previously the model letter referred to the conduct being reported as "*possible* [. . . price fixing, bid rigging, market allocation] or other conduct violative of Section One of the Sherman Act" (emphasis added). The first change is that the word "*possible*" has been deleted from the revised model letters; the second change is the words "or other *conduct violative of*" have been replaced by "or other *conduct constituting a criminal violation of*" Section 1 of the Sherman Act (emphasis added).[223]

The Division's view is that applicants that have not engaged in criminal violations of the antitrust laws; applicants who are unable to confirm that they committed a criminal antitrust violation during the marker period; and applicants that, for whatever reason, are not able or willing to admit their participation in a criminal antitrust conspiracy have no need for, and will not receive, leniency protection.[224] The authors believe the Division is attempting to address the problem created by applicants who report their possibly problematic conduct, without admitting an agreement which would constitute a criminal violation, but still expect to receive leniency based on the rationale that the Division or a court might infer an agreement from the conduct reported. If the Division grants leniency for "possible" violations, it decreases the incentive for applicants to develop the evidence of actual agreements constituting criminal violations and results in a situation where the Division cannot rely on the employees of such applicants for the testimony of an agreement required for the successful prosecution of the other participants. The Division, which is authorized to grant leniency to only one participant in each conspiracy, obviously wants to reserve the leniency reward for those applicants who admit their conduct was criminal and will testify that their co-conspirators were involved in the criminal conduct.

While the authors are aware of and empathize with the problem the Division is attempting to address with this change, we are concerned that the remedy creates more issues than the problem. First, there are situations where the conduct, at least as far as can be verified during the marker period – even by a well-intentioned applicant exercising the highest levels of due diligence and expertise in the gathering and development of evidence, ultimately may or

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[221] *See id.*

[222] *See id.*

[223] *See id.*, at Question 5, footnote 8.

[224] *See id.*, at Question 5.

may not be classified as criminal depending on (a) the further development of evidence over time, and/or (b) the Division's exercise of its prosecutorial discretion as to how it will treat such conduct. In situations where the applicant has reported the conduct, has done everything it reasonably can to develop the evidence, provides a full report to the Division of its internal investigation but is legally unable to admit a criminal violation, and continues to cooperate with the Division's resulting investigation, if the Division ultimately decides to charge a criminal violation based on conduct to which it was directed by the applicant, then we believe the applicant should have leniency protection. Suppose a leniency applicant was unable to admit to a criminal violation because, at the time the company detected possible unlawful collusion with competitors on price, the executive who had the communications – and possible agreements – with competitors had already left the company, was employed by a competitor, and was therefore unavailable to the applicant. Still, the applicant provided the Division with sufficient information to initiate a grand jury investigation. Suppose further that a subject of the resulting investigation then came forward, offered to cooperate, admitted a criminal violation and, therefore, qualified for Type B leniency as the first company to admit a criminal violation and meet the other requirements. This would leave the initial leniency applicant that self-reported, offered full cooperation, and generated the Division's investigation exposed as a putative defendant while a subsequent cooperator received leniency – not an equitable outcome in the authors' view.

There are other issues created by the threshold requirement of an admission of criminal conduct, including: the real danger of "false positives" resulting from corporate or separate counsel pushing witnesses to characterize marginal communications with competitors as agreements; putting the leniency recipient in a worse position than co-conspirators in collateral proceedings; and the greater challenge of convincing boards of directors and management to come forward in close-call situations. While further discussion of this topic is beyond the scope of this paper, this change is one that bears close watching by both the Division and the defense bar to determine whether the positive impact of the stricter standard is more significant than its likely corresponding reduction in applications.

6. Withdrawal, Termination and Accurate Representations Regarding Leniency Obligations.

The revised model amnesty letters and FAQs clarify several issues that arose following the DOJ's revocation of amnesty for shipping company Stolt-Nielsen S.A.[225] In March 2004, Stolt-Nielsen S.A., a Luxembourg company involved in the international parcel tanker shipping cartel, announced that the DOJ had revoked its acceptance into the conditional amnesty program.[226] The circumstances surrounding the revocation of Stolt's amnesty remained unclear

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[225] *See DOJ Releases Revised Amnesty Letter*, GLOBAL COMPETITION REVIEW (Nov. 24, 2008).

[226] *See* Stolt-Nielsen S.A., Press Release, *Stolt-Nielsen S.A. Reports Withdrawal Of Amnesty By Department Of Justice* (Mar. 22, 2004). In June 2003, the DOJ charged a senior executive of Stolt-Nielsen, Richard Wingfield, with one count of violating the Sherman Antitrust Act.

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until early 2005, when an opinion by a U.S. District Court revealed the factual basis of the revocation.[227] The opinion was issued in connection with a lawsuit filed by Stolt to enjoin the DOJ from indicting it for its participation in the parcel tanker shipping conspiracy following the DOJ's revocation of Stolt's amnesty. According to the opinion issued by the District Court, the DOJ alleged that Stolt made representations to Division attorneys that Stolt had ceased its involvement in the conduct at issue in March 2002. Division attorneys later concluded that Stolt had continued its involvement in the conspiracy into the second half of 2002. The DOJ suspended Stolt from the Amnesty Program, and later moved to revoke Stolt's amnesty, on the basis that Stolt had made false representations to Division attorneys about the date of its withdrawal from the conspiracy[228] and therefore had not met the cooperation obligations of its amnesty agreement.

The *Stolt-Nielsen* case created some uncertainty regarding the Division's approach to future leniency applications, and prompted further guidance from the Division. The revised letters and FAQs attempt to make as transparent as possible the circumstances and process under which conditional leniency may be revoked.[229] The FAQs state that the Division may revoke a conditional leniency letter if the applicant fails to satisfy its burden of proving conditions required for eligibility, or fails to provide the required cooperation.[230] They also explicitly guarantee that the Division will notify the applicant's counsel in writing of a recommendation to revoke the applicant's leniency, and will provide counsel with an opportunity to meet with Division staff regarding the revocation.[231] Further, during this period of uncertainty, the Division will suspend the applicant's obligation to cooperate with the investigation.[232]

Finally, the Division has clarified, consistent with its longstanding approach, that the grant of leniency represents an exercise of its prosecutorial discretion. As such, the applicant

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See, e.g., James Bandler, *Stolt-Nielsen Official Is Charged In Global Price-Fixing Inquiry,* Wall St. J. (June 25, 2003), at A3.

[227] *See* Memorandum and Order, *Stolt-Nielsen S.A. et al. v. United States*, 2005 WL 78925 (E.D. Pa. Jan 14, 2005).

[228] The DOJ also alleged that Stolt failed to fully disclose the involvement of some of its senior executives in the activities at issue, though the court's opinion focused on the termination issue.

[229] *See* Hammond, *2009 White Collar Crime Address*, at 3.

[230] *See Frequently Asked Questions* , at Question 27; Hammond, *2009 White Collar Crime Address*, at 3.

[231] *See Frequently Asked Questions*, at Question 27.

[232] *See id.*

must now agree, up front, not to seek judicial review of a Division decision to revoke conditional leniency until the applicant faces criminal charges.[233]

7. Model Amnesty Letter.

In 1998, in the interest of transparency and predictability, the DOJ created a model conditional amnesty letter that is publicly available for prospective applicants to review.[234] The letter stated the particular obligations of an amnesty applicant, including the a detailed description of the required cooperation, and a requirement that the applicant make restitution to victims of the cartel. The letter also bound the government in certain respects beyond the obvious commitment to provide immunity if the applicant met the letter's conditions. For example, the DOJ agreed in the model letter that disclosures made to the DOJ by counsel for the amnesty applicant in furtherance of the amnesty application would not constitute a waiver of the attorney-client privilege.[235]

As discussed above, in November 2008, for the first time in more than a decade, the DOJ issued revised versions of the model amnesty letter.[236] The Division claims that none of the revisions to the letters represent changes in the leniency program, but reflect the Division's efforts to clarify the requirements of the leniency program and remove any perceived ambiguities in the original letter.[237]

B. The Impact Of The Revised Amnesty Policy On Criminal Enforcement In The United States

The revised amnesty policy has had a tremendous impact on antitrust enforcement in the United States, an impact that cannot be understated. Deputy Assistant Attorney General Scott

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[233] *See Frequently Asked Questions*, at Question 28; Hammond, *2009 White Collar Crime Address*, at 4.

[234] *See* Spratling, *Answers To Recurring Questions* (introducing and attaching Model Amnesty Letter).

[235] *See id.*

[236] *See* United States Department of Justice, Antitrust Division, *Model Corporate Conditional Leniency Letter*, available at www.usdoj.gov/atr/public/criminal/239524.htm (Nov. 19, 2008); United States Department of Justice, Antitrust Division, *Model Individual Conditional Leniency Letter*, available at www.usdoj.gov/atr/public/criminal/239526.htm (Nov. 19, 2008).

[237] *See* Hammond, *2009 White Collar Crime Address*, at 1.

Hammond has called it the Division's "most effective investigative tool."[238] In many instances of hard-core violations, participating companies are literally racing each other to the Antitrust Division to seek amnesty, and they are doing so in numbers that have increased steadily, almost without stop, since the policy was announced in 1993. The amnesty program and related policies have generated a significant number of new and often large cases, including the very largest, particularly in the international cartel arena. These new cases and the cooperation and information provided by amnesty applicants have, in turn, led to an enormous increase in the size of financial penalties levied on companies and individuals and in the number and length of prison sentences for individuals convicted of antitrust and related offenses.

A simple comparison of certain measures as they existed on August 10, 1993, when the revised DOJ policy was adopted, with August 10, 2003, a decade later, tells a compelling story. On August 10, 1993, there were only three sitting grand juries in the United States investigating suspected international cartel activity; on August 10, 2003, there were 49. In August 1993 the highest criminal fine to date relating to cartel conduct was $5 million; in August 2003 it was $500 million. Comparing the numbers of foreign defendants subject to criminal prosecution in the United States for cartel violations shows similar striking growth. From the passage of the Sherman Act in 1890 to August 1993, there were only eight foreign corporations and eight foreign individuals – for a total of 16 – prosecuted for cartel activity in the United States. By August 2003, however, 72 foreign corporations and 90 foreign individuals –a total of 162 foreign defendants – had been subject to criminal prosecution by the U.S. DOJ.

1. The Race To The Prosecutor

Under the amnesty policy, the extremely beneficial prizes awarded to the first amnesty applicant in the door, in combination with the fact that the most important of those prizes – no criminal conviction, no fines, no jail time – are unavailable to the second arrival, have made getting in first the top priority for companies who decide to self-report (or who believe a co-conspirator is likely to self-report).

The Antitrust Division has made no secret – indeed officials of the agency have broadcast – that its objective has been to create a race to the prosecutor.[239] The Division emphasizes that

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[238] Scott D. Hammond, *Cracking Cartels With Leniency Programs*, address before the OECD Competition Committee Working Party No. 3 Prosecutors Program (Oct. 18, 2005) (hereinafter "Cracking Cartels With Leniency").

[239] *See* Hammond, *Cracking Cartels With Leniency*; Scott D. Hammond, *Cornerstones Of An Effective Leniency Program,* address before the ICN Workshop on Leniency Programs (Nov. 22-23, 2004) (hereinafter "Cornerstones"); Scott D. Hammond, *Lessons Common To Detecting And Deterring Cartel Activity*, address before the Third Nordic Competition Policy Conference (Sept. 12, 2000) (hereinafter "Lessons Common to Detecting and Deterring"); Spratling, *Corporate Leniency Policy Update*.

only the first in the door gets amnesty,[240] cites the adverse financial consequences of not being first in the door, and discloses that the difference between being first and second is often only a few days, and sometimes only a few hours.[241] The Division makes it clear that this is not just a race among Goliaths – the Individual Leniency Policy is intended to entice individual employees to self-report as well, and there is no question that a company may well be racing its own employees to the Division's door.[242]

Members of the private bar have heard the Division's message and responded to it with intense efforts to be first in the door when their clients decide to investigate and report violations.[243] In one matter the authors are familiar with, counsel for two different cartel participants contacted the Division less than 10 minutes apart.

2. Increase In The Number Of Applications For Amnesty

As word of the policy's benefits spread, more and more corporations came forward to report their activities and seek amnesty. Prior to August 1993, the Division received an average of one amnesty application per year.[244] Under the new policy, the rate has jumped to approximately two per *month*.[245]

3. Increase In Caseload: The Amnesty Policy As A Significant Generator Of New Cases

One of the major fruits of the amnesty policy is the increase in the Division's criminal caseload. The Division has repeatedly stated that the amnesty program is its most significant generator of new criminal investigations. Former Assistant Attorney General R. Hewitt Pate has said that the leniency policy "has led to the detection and prosecution of more international

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[240] A company that is second in the door can offer to cooperate with the Division's investigation and may enter into a plea agreement and have its fine reduced. Massoudi, *Cartel Enforcement*, at 7.

[241] *See* Hammond, *Lessons Common To Detecting And Deterring*; Spratling, *Corporate Leniency Policy Update*; Hammond, *Criminal Enforcement Update* at 11.

[242] *See* Hammond, *Cornerstones,* at 6-7.

[243] *See*, *e.g.*, Jeff Chorney, *Antitrust Prosecutors Breaking Cartels With Immunity*, THE RECORDER (Sept. 27, 2004); Janet Novak, *Fix And Tell*, FORBES (May 4, 1998), at 46; Jayne O'Donnell, *Company Turncoats Race To Justice For Corporate Amnesty*, USA TODAY (June 1, 1999), at 1B.

[244] *See* Hammond, *Criminal Enforcement Update*, at 11.

[245] *Id.*

cartels than all of our search warrants, consensual monitoring, and FBI interrogations combined."[246] To further the end of generating even greater numbers of new criminal investigations, the Division has developed three notable policies and practices that – perhaps as much, and possibly more, than the core amnesty policy – have significantly increased the Division's effectiveness at uncovering additional anticompetitive activities: Amnesty Plus, Penalty Plus, and the omnibus question.

a) Amnesty Plus And Penalty Plus: The Carrot And The Stick

The Antitrust Division uses a carrot-and-stick approach to encourage the reporting of information about additional cartel activities by rewarding those who report under certain circumstances and significantly penalizing those who do not.

(1) Amnesty Plus

The Antitrust Division initiates approximately one-half of its international cartel investigations as spin-offs of ongoing investigations.[247] As the Division observed this pattern developing in the early years of the amnesty policy, it developed a proactive program, "Amnesty Plus," to further attract amnesty applications by encouraging subjects and targets of investigations to consider whether they may qualify for amnesty in other markets where they sell.[248]

Amnesty Plus results when a company is negotiating a plea agreement in a current investigation and seeks to obtain more lenient treatment in its plea agreement by offering to disclose the existence of a second, unrelated conspiracy. In such a case, the company that reports the second conspiracy and cooperates in the resulting investigation will receive amnesty for and pay no criminal fines in connection with the second offense, and none of its officers, directors, or employees who cooperate will be prosecuted criminally in connection with that offense. In addition, the company will receive a substantial additional discount (the "plus") from the Division in the calculation of the fine for its participation in the first conspiracy.

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[246] *See* R. Hewitt Pate, *International Anti-Cartel Enforcement*, address before ICN Cartels Workshop (Nov. 21, 2004), at 8, at 5.

[247] Hammond, *Second-In Cooperation*, at 9. In November 2007, there were roughly 56 sitting grand juries investigating suspected international cartel activity, many of which began as a result of evidence uncovered during an investigation of a completely separate industry. Hammond, *Recent Developments I*, at 13.

[248] *See* Hammond, *Second-In Cooperation*, at 9-11; Barnett, *Seven Steps*, at 8-9; Spratling, *Corporate Leniency Policy Update; see also* Gary R. Spratling, *International Cartel Enforcement Environment*. The Division's success in rolling one investigation into another has led the Division to engage in "cartel profiling" strategies to uncover additional offenses. Hammond, *Recent Developments I*, at 14.

(2) Penalty Plus

The Antitrust Division now takes the position that, if a company has the opportunity for an Amnesty Plus disclosure and rejects it in favor of nondisclosure, it will seek a substantial increase in the penalty against the company for its failure to report the second offense.[249] This increases the incentive for each company in this situation to report the second offense and, therefore, enhances the risk that the cartel will be detected.

This increase in penalty is referred to as "Penalty Plus," and results when a company has knowledge of a second offense but elects not to report it, and the Antitrust Division later detects the second offense, discovers the company's nondisclosure election, and successfully prosecutes the company for that offense. Under Penalty Plus, the Division will then urge the sentencing court to consider the company's and any culpable executive's failure to report as an aggravating sentencing factor. The Division will request that the court impose a term and conditions of probation and will pursue a fine or jail sentence at or above the upper end of the U.S. Sentencing Guidelines range.

The Division has made it clear that severity of the penalty will depend on the reason for the company's inaction. The penalty will be greater for a company that is aware of the second offense but chooses not to report it than one that fails to detect the wrongdoing as a result of an unsuccessful internal investigation. In assessing the amount of the penalty, the Division will "distinguish between those companies that made every effort to ferret out wrongdoing in their internal investigations and those that simply turn[ed] a blind eye."[250]

For a company, the failure to self-report under amnesty-plus circumstances could mean the difference between no fine at all on the second product under Amnesty Plus, and a fine as high as 80 percent of the volume of affected commerce under Penalty Plus. For the executives, it could mean the difference between no jail and a lengthy jail sentence.

b) The Omnibus Question

The Amnesty Plus program's efforts to leverage off of existing leniency applications to discover other violations are bolstered by another notable practice within the Antitrust Division – the now-standard practice of Division attorneys to ask the so-called "omnibus question" at the conclusion of a witness interview (or grand jury interrogation).[251] While the decision as to whether to seek Amnesty Plus credit in appropriate circumstances is one the cooperating company gets to make itself, the omnibus question is one important aspect of the Division's

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[249] *See* Hammond, *Calculating the Costs and Benefits*, at 7 (discussing Penalty Plus); Spratling, *International Cartel Enforcement Environment*, at 25.

[250] Hammond, *Recent Developments I*, at 14.

[251] *See* Spratling, *International Cartel Enforcement Environment*.

leniency policy that is not discretionary.

Division attorneys pose the omnibus question after examining a witness about anticompetitive activities in connection with a specific product(s) in the subject industry.[252] The question goes something like this: "Do you have any information whatsoever, direct or indirect, relating to [description of conduct: *e.g.*, price fixing, bid rigging, market allocation] with respect to other products in this industry or in any other industry?" The witness must answer the question, and must answer it fully and truthfully, or he/she not only would lose whatever protection he/she would otherwise have had for his/her statements under a conditional amnesty or plea agreement, but also would be subject to the penalties of perjury or making false statements or declarations. There is virtually no wiggle room and no basis for not answering the question, no matter what the collateral implications are to the firm sponsoring the witness pursuant to the cooperation requirements of a conditional amnesty agreement or plea agreement.

4. Increase In Penalties – Fines And Jail

According to the Division, cooperation from amnesty applicants has been the foundation for the conviction of "scores" of individuals and corporations and the imposition of 90 percent of the fines it has imposed since it began tracking these numbers in fiscal year 1997.[253] The Division has noted that its criminal cartel enforcement has never been stronger, and that recent increases in fines and jail time are intended to send the "clear message" that the antitrust environment in the United States is "tougher than ever before," and will continue to get even tougher.[254]

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[252] In the international cartel context, the omnibus question comes up most commonly in three situations: (i) a cooperating director, officer, or employee being interviewed pursuant to the Antitrust Division's conditional amnesty agreement with his/her firm; (ii) a cooperating director, officer, or employee being interviewed pursuant to the cooperation provisions of the Antitrust Division's plea agreement with his/her firm; or (iii) an executive being interviewed pursuant to the cooperation provisions of his/her separate plea agreement with the Antitrust Division. The omnibus question is also asked in grand jury interrogations, but to date that has been a less common method of developing evidence of cartel activity in the subject investigation and in spin-off investigations.

[253] Hammond, *Criminal Enforcement Update* at 2, 11; Hammond, *Cornerstones*, at 1; *see also* R. Hewitt Pate, *Anti-Cartel Enforcement: The Core Antitrust Mission*, address before British Institute of International and Comparative Law Third Annual Conference on International and Comparative Competition Law, May 16, 2003 (hereinafter "Anti-Cartel Enforcement"), (noting that the amnesty policy has given rise to "an increase in the quality and quantity of the evidence of a cartel and a corresponding increase in the rates of conviction in our cases.").

[254] Barnett, *Antitrust Update, supra* note 10.

Since fiscal year 2001, the Antitrust Division has obtained over $3.5 billion in fines from corporate and individual criminal defendants.[255] The total fines obtained by the Division during fiscal year 2009, alone, were more than $1 billion, the second highest total in Division history.[256] And from August 2007 through June 2008, as mentioned in Section IV.1.a. above, the Antitrust Division levied over $1.27 billion in fines in connection with its ongoing investigation into price-fixing conspiracies in the air transportation industry, including a $350 million fine against Air France-KLM, a $300 million fine against British Airways, and a $300 million fine against Korean Air Lines.[257] This trend continued into fiscal years 2009 and 2010, when the Antitrust Division announced a $400 million fine against LG and a $220 million fine against Chi Mei Optoelectronics for their roles in the TFT-LCD cartel.[258]

In recent years, the Division has highlighted another success in its cartel enforcement program that has often been overshadowed by the increasing size and number of corporate fines: individual jail sentences.[259] Since fiscal year 2000, almost 60% of defendants charged by the Division were sentenced to jail time and more than 150 individuals have served, or are currently

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[255] *See* United States Department of Justice, The Accomplishments of the U.S. Department of Justice 2001-2009 (Jan. 16, 2009) at 1, available at www.usdoj.gov/opa/documents/doj-accomplishments.pdf.

[256] *See* Lynch, *International Antitrust Litigation*.

[257] United States Department of Justice, Press Release, *British Airways PLC and Korean Air Lines Co. LTD Agree to Plead Guilty and Pay Criminal Fines Totaling $600 Million for Fixing Prices on Passenger and Cargo Flights* (Aug. 1, 2007), *available at* http://washingtondc.fbi.gov/dojpressrel07/wfo080107.htm; *DOJ Slams Air Cargo Cartelists*, *supra* note 11.

[258] United States Department of Justice, Press Release, *LG, Sharp, Chunghwa Agree to Plead Guilty, Pay Total of $585 Million in Fines for Participating in LCD Price-Fixing Conspiracies* (Nov. 12, 2008); United States Department of Justice, Press Release, *Taiwan LCD Producer Agrees to Plead Guilty and Pay $220 Million Fine for Participating in LCD Price-Fixing Conspiracy* (December 9, 2009).

[259] *See* Statement of R. Hewitt Pate, Assistant Attorney General, Antitrust Division, Before the Committee on the Judiciary, United States House of Representatives, Concerning Antitrust Enforcement Oversight, July 24, 2003 (citing "a recent trend toward more certain and longer prison terms for individual antitrust offenders."); Hammond, *Calculating The Costs And Benefits* ("In the past two years, the stakes have increased for individuals. While many observers have focused on the record corporate fines over the last few years, fewer have recognized the recent dramatic increase in the length and incidence of individual jail sentences.").

serving, prison sentences in connection with antitrust and related offenses.[260] More than 40 defendants have received terms of one year or longer.[261] In the last few years, defendants prosecuted by the Division have been sentenced to record-setting total jail days.[262]

Not only are more defendants prosecuted by the Division going to jail, but also those sentenced to jail are serving, on average, increasingly longer sentences. The average jail sentence has more than doubled in the past ten years, rising from an average of eight months in 1997 to an average of 31 months during fiscal year 2007, an all-time high.[263] The average jail sentences imposed in fiscal years 2008 and 2009 were slightly shorter, at 25 months and 24 months respectively.[264]

Like the rise in corporate fines, there can be no doubt that some of this increase can be credited to the quality and quantity of evidence generated by the amnesty program.

5. International Prosecutions

Prior to the introduction of the revised amnesty policy, the Antitrust Division had no international cartel program to speak of. In the early days of the amnesty policy, however, the Division identified detection and prosecution of international cartels as a top priority. The amnesty policy has come to play a very significant role in what has turned out to be a blockbuster program for the Division, and the Division continues to consider the amnesty

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[260] Hammond, *Recent Developments I*, at 4.

[261] Hammond, *Criminal Enforcement Update*, at 1, 3. These figures include the longest jail sentence ever imposed on a defendant in connection with antitrust offenses: a ten-year sentence for Austin "Sonny" Shelton for his role in a bid rigging, bribery, and money laundering scheme in Guam. It also includes one of the longest sentences imposed in connection with a case involving an amnesty applicant. In May 2002, Elmore Roy Anderson was sentenced to serve three years in prison and pay a $25,000 fine after being convicted at trial for his role in an international conspiracy to rig bids on U.S. government-funded construction contracts. The government's investigation into this conspiracy, which also led to the conviction of four companies and over $140 million in fines, was advanced through the assistance of an amnesty applicant.

[262] As mentioned in Section IV.2.a, in fiscal year 2007, defendants were sentenced to over 31,000 total jail days. Although that number dropped to 14,331 days in fiscal year 2008, the number returned to near-record levels in 2009 with 25,396 total jail days imposed. *See* Lynch, *International Antitrust Litigation*.

[263] *Id.* at 5; Barnett *Global Antitrust Enforcement*, at 5.

[264] *See* Lynch, *International Antitrust Litigation*.

program its most effective generator of international cartel cases.[265]

In mid-2002, the Division had over 30 sitting grand juries investigating cartel activity that was international in scope.[266] By mid-May of 2003, that number had risen to 40.[267] Currently, there are over 50 sitting grand juries investigating international cartel activity.[268]

The overwhelming majority of large fines imposed on antitrust defendants have been against organizations involved in international cartels.[269] For example, in all but one case where the U.S. Department of Justice has secured a fine above $20 million for cartel activity, the cartel has been international in scope, as opposed to domestic. In 29 of the 36 instances in which the fine was $20 million or greater, and in 47 of the 56 instances in which the fine was $10 million or greater, the organizations were foreign-based.[270]

With improved cooperation with foreign law enforcement authorities, which has provided the Antitrust Division with increased access to foreign-located evidence and witnesses, the Division has successfully prosecuted foreign defendants from Canada, France, Germany, Japan, South Korea, the Netherlands, Norway, Sweden, Switzerland, Taiwan, and the United Kingdom for engaging in cartel activity. Those individuals have served, or are currently serving, prison sentences in the U.S.[271] As a result, in part, of the dramatic increase in international cooperation over the last few years, the Antitrust Division now seeks jail sentences for all defendants – domestic and foreign.[272]

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[265] *Id*. at 11. *See also* Hammond, *Recent Developments I*, at 1.

[266] U.S. Department of Justice, Antitrust Division, *Antitrust Division Status Report: International Cartel Enforcement* (Feb. 2002), *cited in* Spratling, *International Cartel Enforcement Environment*, at 2.

[267] *See* Pate, *Anti-Cartel Enforcement*.

[268] Hammond, *Criminal Enforcement Update*, at 2; Hammond, *Recent Developments I*, at 15. International cartel investigations account for over 40% of the Division's grand jury investigations. *Id.*

[269] Of the over $4 billion in criminal fines imposed by the Division cases since FY 1997, well over 90 percent were obtained in connection with the prosecution of international cartel activity. Hammond, *Recent Developments I*, at 15.

[270] U.S. Department of Justice, Antitrust Division, *Sherman Act Violations Yielding A Fine Of $10 Million Or More* (Aug. 1, 2007); *see also* Hammond, *Recent Developments I*, at 15.

[271] Lynch, *International Antitrust Litigation*.

[272] *Id.*

C. International Cartel Enforcement Outside The United States: Leniency Fever, Convergence And Stepped-Up Enforcement

As discussed above, serious cartel enforcement activity around the world has increased dramatically, as more and more jurisdictions have initiated or stepped up their enforcement efforts, domestic and international, and created or strengthened leniency policies. Section IV of this paper detailed some of the most critical recent developments relating to international cartel enforcement activity.

1. Convergence in Leniency Policies

The success of the DOJ's 1993 Amnesty Program has led other countries to adopt leniency programs – now viewed as an essential component of a modern, viable anti-cartel enforcement strategy. As a consequence, leniency policies are cropping up around the globe, and the increasing number of enforcers investigating cartels and using well-designed leniency programs has increased the risk of detection.[273] In August 1993, only one jurisdiction outside of the U.S. – Canada – had a leniency policy. In August 2003, ten years after the introduction of the revised U.S. amnesty policy, there were thirteen adopted or proposed leniency or amnesty policies outside of the U.S., and that number has since doubled. The growing number of countries that have developed or are in the process of developing their own leniency policies, in addition to the EU and Canada, include: Australia, Austria, Belgium, Brazil, Bulgaria, Colombia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, India, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Singapore, Slovakia, South Africa, Spain, Sweden, Switzerland, Turkey, and United Kingdom. Most of the policies have either been patterned after the U.S. policy or eventually gravitated toward the U.S. approach in most respects. This convergence in policies has been critical to encouraging the reporting of international cartels because it has made it easier and more attractive for companies to simultaneously seek and obtain amnesty in the U.S., Europe, Canada, and other jurisdictions.[274]

Spain provides a dramatic illustration of how a leniency program has revolutionized

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[273] Thomas O. Barnett, *Competition Enforcement in an Innovative Economy*, Address at the 4th Annual Competition Policy Conference, The Role of Competition and Liberalization in Furthering Competitiveness (June 20, 2008).

[274] Thomas O. Barnett, *Global Antitrust Enforcement*, presented at the Georgetown Law Global Antitrust Enforcement Symposium (Sept. 26, 2007), at 2; *see also India Introduces Leniency Programme*, GLOBAL COMPETITION REVIEW (Aug. 25, 2009); *Estonia Drafts Leniency Law*, GLOBAL COMPETITION REVIEW (Jan. 7, 2009); *Egyptian Antitrust Law Sparks Controversy*, GLOBAL COMPETITION REVIEW (June 27, 2008); *France and DG Comp Explain Settlements*, GLOBAL COMPETITION REVIEW (Apr. 4, 2008); *Slovakia Fines GIS Cartel in First Leniency Case*, GLOBAL COMPETITION REVIEW (Jan. 21, 2008).

international cartel enforcement. Following the passage of its first competition act, Spain's Competition Commission was organized in September 2007. Five months later, the Commission published a provisional leniency guideline amid skepticism that traditional Spanish companies would choose to participate.[275] But companies began lining up outside the Commission offices almost a week before the leniency program took effect. Six companies filed leniency applications on February 28, 2008, the first day the leniency policy came into force. One company's officials spent five days outside the offices, sleeping in a nearby car, to ensure its position as the first leniency applicant.[276] This dramatic success demonstrates the immediate benefit of leniency policies to an enforcement agency.

Although the leniency policies in different jurisdictions will and do vary in some ways, there is a broad recognition that the policies need to be similar in material respects because decisions made by international cartel participants about whether to self-report and cooperate with enforcement authorities are global decisions. If the provisions of the leniency policy in one jurisdiction are sufficiently unattractive to dissuade a potential applicant from applying there, that potential applicant may not self-report or cooperate in any jurisdiction.

In recent years, several major jurisdictions have revised or introduced leniency policies that take into account this need for and benefit from consistency among jurisdictions, including the EU, Canada, Australia, the United Kingdom, Japan, Korea, and South Africa, discussed below.[277]

a) EU

The EC issued its Notice on Immunity From Fines and Reduction of Fines in Cartel Cases in December 2006,[278] replacing an earlier policy first issued in 1996[279] and amended in

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[275] *Spain Launches Leniency Programme*, GLOBAL COMPETITION REVIEW (Feb. 20, 2008).

[276] *Spanish Companies Queue For Leniency*, GLOBAL COMPETITION REVIEW (Mar. 4, 2008).

[277] In line with these developments, Singapore recently introduced a Leniency Plus scheme, similar to those enacted in the U.S., Australia, and the U.K., and it announced plans to create a marker scheme, discussed below. *Singapore Introduces Leniency Plus*, GLOBAL COMPETITION REVIEW (Sept. 4, 2008).

[278] *Commission Notice On Immunity From Fines And Reduction Of Fines In Cartel Cases*, 2006/C298/11, 2006 O.J. (C298) 17 (hereinafter "2006 Leniency Notice").

[279] *Commission Notice On The Non-Imposition Or Reduction Of Fines In Cartel Cases*, 96/C807/04, 1996 O.J. (C207) (hereinafter "1996 Leniency Notice").

February 2002.[280] The EC's policy, although different in some significant respects from the policies of the U.S. and Canada, has been extremely successful. The Commission received 20 applications within the first year after the 2002 Leniency Notice – a larger number of applications than it received in total during the six years under its initial policy.[281] Between February 2002 and the end of 2005, the Commission received a total of 167 applications for leniency, 87 for immunity and 80 for a reduction in fines.[282]

Like Canada and the U.S., the EU provides a guarantee of full immunity for qualifying applicants.[283] The immunity applicant has to meet certain conditions, including that it "did not take steps to coerce other undertakings to participate in the infringement,"[284] and that it be the first to "submit information and evidence which in the Commission's view will enable" the Commission to proceed with a dawn raid or find an infringement of Article 81(1) of the EC

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[280] *Commission Notice On Immunity From Fines And Reduction Of Fines In Cartel Cases*, 2002/C45/03, 2002 O.J. (C45) 3 (hereinafter "2002 Leniency Notice").

[281] *See* Bertus van Barlingen, *A View From the Inside: The European Commission's 2002 Leniency Notice After One Year of Operation,* ANTITRUST 84 (Spring 2003) (providing a response) (hereinafter "A View From The Inside") (republished by the EC at EC COMPETITION POLICY NEWSLETTER 16 (Summer 2003)).

[282] Europa, Press Release, *Competition: Commission Leniency Notice Frequently Asked Questions* (Dec. 7, 2006) (hereinafter "2006 Leniency Press Release"); *see also*, European Commission, *Report From The Commission: Report On Competition Policy 2005*, (June 15, 2006), at Section B.5.1.2, ¶ 175; Bertus van Barlingen and Marc Barennes, *The European Commission's 2002 Leniency Notice In Practice*, EUROPEAN COMMISSION COMPETITION POLICY NEWSLETTER (Autumn 2005), at 6 (hereinafter "Leniency Notice In Practice"). Van Barlingen and Barennes, both officials with the Directorate-General Competition, also share some very interesting statistics relating to these leniency applications. At the end of September 2005, the Commission had granted conditional immunity in 49 cases, was considering 12 applications, had rejected conditional immunity in 19 cases, and had revoked conditional immunity in one case in which the applicant had informed other cartel participants about its application prior to the dawn raid. Van Barlingen and Barennes provide useful detail about the reasons why applicants can be rejected or their conditional immunity revoked. *Id.* at 10-13. Also at the end of September 2005, the Commission had granted a reduction in fine to 18 of the 79 applicants for a reduction, had rejected a few as not providing significant value (the number is unknown to the authors) and was still considering the majority of the applications.

[283] *2006 Leniency Notice* ¶ 8. Of the 87 requests for immunity from February 2002 through the end of September 2005, the Commission granted conditional immunity only on 51 of the applications. *2006 Leniency Press Release*.

[284] *Id.* ¶ 13(c).

Treaty.[285] In order to clarify what information and evidence is sufficient, the 2006 Leniency Notice provides a checklist of details that an applicant must provide in order to obtain immunity.[286]

Companies that are not candidates for full immunity may still benefit from a reduction of fines through cooperation with the EC. These companies may receive fine reductions if they have terminated their participation in the cartel and provide evidence that represents "significant added value" to the information and evidence that is already in the EC's possession.[287] Under the December 2006 revisions, candidates are more likely to receive a fine reduction if they provide evidence that requires little or no corroboration and corporate statements without corroborating evidence will likely be considered insufficient.[288] The first qualifying non-immunity applicant will enjoy a 30-50 percent reduction in the otherwise applicable fine; the second in the door will receive a 20-30 percent reduction in fine and subsequent companies will be eligible for up to 20 percent reduction.[289] Additionally, as mentioned in Section IV.1.b. above, the European Commission announced a settlement procedure in June 2008 that will allow members of cartels to reduce their fines by 10 percent if, after seeing the evidence against them in the Commission file, they decide to acknowledge their involvement in and liability for the cartel activity. The new settlement procedure is intended to reinforce deterrence by allowing the Commission to resolve cartel cases more quickly, thereby freeing up Commission resources for additional investigations. The procedure has garnered mixed reactions from competition specialists, a number of whom question the commercial value of the procedure to a company that has already applied for leniency.[290]

The most significant revisions in the December 2006 Leniency Notice concern (1) the adoption of a marker system; (2) the use of oral corporate statements; and (3) the sufficiency of evidence required to meet the immunity threshold. Each of these changes merit particular attention when deciding whether or not to seek immunity in the EU.

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[285] *Id.* ¶ 8.

[286] Id. ¶ 9.

[287] European Commission, Cartels: Leniency, http://ec.europa.eu/comm/competition/cartels/leniency/leniency.cfm. Evidence will be considered of "significant added value" for the Commission when it "reinforces its ability to prove the infringement." *Id.*

[288] *See id.* ¶ 25; Competition Bureau, *Competition: Revised Leniency Notice – Frequently Asked Questions*, (Dec. 7, 2006), at 3 (hereinafter "2006 Leniency Notice FAQs").

[289] *Id.* ¶ 26; European Commission, Cartels: Leniency.

[290] *EU Settlements Procedure Met with Skepticism*, GLOBAL COMPETITION REVIEW (June 30, 2008).

Marker System

The adoption of a marker system in December 2006 allows an immunity applicant to preserve an early reporting time while performing internal investigations to perfect the immunity application. Not only did the 2002 policy not employ a marker system, but the Commission made it clear that immunity applicants could lose their place in line if another applicant submitted sufficient evidence any time before the applicant itself submits sufficient evidence. In other words, immunity applicants lost the race if another party submitted evidence not only between the time the applicant set up an appointment to make an oral presentation and the time of the presentation, but during the presentation itself, should the Commission receive sufficient evidence while, for example, the parties are taking a lunch break.[291] The adoption of a marker system will prevent applicants that obtain a marker from being leapfrogged by later applicants until the expiration of the marker.[292] However, formal applicants still face the prospect of losing immunity (and being leapfrogged) because the applicant is not allowed to submit supplemental information once a later applicant begins submitting information and evidence.

The EU's marker system, however, deviates from other jurisdictions in two important aspects. First, the EC requires detailed information disclosures in order to secure a marker, and, second, the EC has discretion to grant or refuse the marker after receiving the detailed application. In order to obtain a marker, an applicant must provide the Commission with its name and address, the parties to the alleged cartel, the affected product(s) and territory(-ies), the estimated duration of the alleged cartel and the nature of the alleged cartel conduct.[293] In

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[291] According to van Barlingen and Barennes, "Whenever immunity applications are not made in a single uninterrupted period, even if it concerns just a break over a lunch, the rule applies that should a second applicant submit evidence regarding the same infringement in the intervening period, the first application can no longer be supplemented with further evidence and will be evaluated on the basis of the evidence submitted until the moment the second application was made. Applicants therefore have every incentive to submit a maximum of evidence within the shortest possible period." van Barlingen and Barennes, *Leniency Notice in Practice*, at 10.

[292] The 2006 Leniency Notice contains an assurance, as did the 2002 Lenience Notice, that the "Commission will not consider other applications for immunity from fines before it has taken a position on an existing application in relation to the same alleged infringement." *2006 Lenience Notice*, ¶ 22; *see also 2002 Leniency Notice*, ¶ 18. The Commission's practice, however, is to prevent the first applicant from presenting any additional evidence once the second applicant begins submitting evidence. *See* van Burlingen, *A View From The Inside*, at 18. An applicant with a marker may supplement its application until the marker period expires, unlike a formal applicant process where the Commission considers the first application completed as soon as another applicant submits evidence. *See 2006 Leniency Notice FAQs*, at 1.

[293] *See 2006 Leniency Notice*, ¶ 15.

contrast, the U.S. and Canada allow markers based upon a no-names (anonymous) basis and require only the most basic information, such as suspected type of infringement and the affected product.[294] Even after submitting this sensitive information, however, the EC marker may not be granted, as the Commission makes the discretionary decision on a case by case basis.[295] Applicants may be wary of requesting markers that will be granted at the Commission's discretion and, if granted, do not guarantee how much time the applicant will have to perfect its application. While the United States and Canada also have flexible time limits for a marker based on the complexity of the internal investigation required, the Commission has indicated that the "time period will necessarily be short so as not to disadvantage other potential applicants and to ensure that an investigation in the case can be launched swiftly."[296] In addition, the 2006 Leniency Notice does not allow a marker applicant to proceed with hypothetical disclosures.[297] For these reasons, the Antitrust Section and the International Law Section of the ABA predicted that EC's discretionary marker system with significant early disclosure requirements would not be as effective as other existing marker procedures.[298]

Oral Corporate Statements

For years, one of the biggest points of friction and discussion between defense counsel and the EC under the 2002 policy related to the Commission's then-evolving process with respect to corporate statements made in application for leniency, and the vulnerability of those statements to discovery requests in private litigation. Because written applications are vulnerable to discovery requests, counsel for amnesty applicants generally prefer to make their applications orally so that the applicant is not disadvantaged in civil litigation vis a vis other defendants by virtue of having to turn over, in essence, a roadmap to the case. Over time, the

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294 The United Kingdom is also expected to adopt a no-names marker system very soon. See full discussion below in Section V.C.1.d.

295 *2006 Leniency Notice FAQs*, at 5.

296 *Id*. at 6.

297 *See 2006 Leniency Notice,* ¶¶ 15-16.

298 "The Draft Notice creates a perverse incentive. The undertaking that joins the race for a marker too quickly and provides what turns out to be incorrect specifics in obtaining its marker may find itself having lost the race to an undertaking that waits until the completion of its internal investigation before going forward to the Commission. Thus, undertakings will be fearful of 'getting it wrong' if the move quickly." *Comments of the ABA Section of Antitrust Law and Section of International Law in Response to the Commission of the European Communities' Request for Public Comment on the Draft Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases* (Nov. 2006), at 11, *available at* http://www.abanet.org/antitrust/at-comments/2006/11-06/comments-ec-leniency.pdf (hereinafter "ABA November Comments").

Commission's process with respect to oral applications for leniency evolved to a generally workable compromise: after recording oral statements, the Commission then, at various times, either required the applicants to review the transcript of the recording, review and sign the transcript, review and attest to the accuracy of the transcript, or listen to the tape and attest to the accuracy of the tape. Until the 2006 Leniency Notice, the Commission's practice had been to permit applicants to review the transcript if they would like to, but not require applicants to review the transcript and endorse it in any way.

In December 2006, responding to the concerns expressed by defense counsel, the Commission revised its leniency policy relating to the form of corporate statements.[299] The Commission recognized that discovery of corporate statements could have a significant negative impact on its own leniency program and the programs of other jurisdictions. The revision explicitly permits oral applications for leniency, which would be recorded and transcribed. Following transcription, applicants would have to confirm the accuracy of the transcript; oral confirmations of accuracy would be recorded. The transcripts would then become evidence, but the Commission has instituted several protections including limiting access to corporate statements solely to addressees of the statement of objections,[300] and making statements accessible only on the Commission premises and prohibiting the statements from being copied, even by addressees of a statement of objections, so the Commission can maintain possession and control of the corporate statement.[301] The Commission also prohibited those accessing the corporate statements from using the information contained in the statement for any purpose other than "judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings."[302] The Commission has formally stated that it "will never disclose to parties in private actions for damages any corporate statements it receives in the context of its Leniency Notice." Nor will it transmit such to national courts.[303] The Commission sought to remove any disincentive to cooperation by "ensur[ing] that applicants that cooperate with the Commission investigation are not impaired in their position in civil proceedings, as compared to companies who do not cooperate."[304] These revisions drew

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[299] *See 2006 Leniency Notice*, ¶¶ 9(a), 32; *2006 Leniency Notice FAQs,* at 7.

[300] *2006 Leniency Notice at* ¶ 33.

[301] *Id*.

[302] *Id*. at ¶ 34.

[303] Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules {COM(2008) 165 final} {SEC (2008) 405} {SEC (2008) 406}, at ¶ 299.

[304] Competition Bureau, *Competition: Commission Adopts Revised Leniency Notice To Reward Companies That Report Cartels*, (Dec. 7, 2006), at 2. To further this goal, the 2006 revisions adopted procedures to restrict access to corporate statements in the Commission's file and

[Footnote continued on next page]

comments from a variety of quarters when they were proposed, including the Antitrust Section of the ABA. The Section's comments on the revisions to the form of corporate statements noted a variety of drawbacks to the Commission's revisions.[305] Though cumbersome, the Commission's handling of corporate statements has proven workable and effective, and is used regularly by leniency applicants.

Immunity Threshold

The Commission also revised the threshold for obtaining immunity in an attempt to provide clarification and increase transparency. The 2006 Leniency Notice requires an applicant to provide the information and evidence identifying the cartel's aims, activities, functioning; the products or services concerned; the geographic scope, duration, and estimated market volumes affected; the specific dates, locations, content of any participants in cartel contacts; and names and addresses for all cartel participants. Additionally, the applicant must provide all evidence relating to the cartel in its possession and known to the applicant, including contemporaneous

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[Footnote continued from previous page]

ensure that such statements are used solely in connection with EC competition proceedings. *See 2006 Leniency Notice*, ¶¶ 31-35. In addition, Philip Lowe, the Competition Director General of the EC, outlined the detrimental effect that civil discovery of corporate statements offered for leniency had on cartel enforcement in both the EU and the U.S. Philip Lowe, *Submission to the Antitrust Modernisation Commission* (Apr. 4, 2006).

[305] *See Comments of the ABA Section of Antitrust Law in Response to the Commission of the European Communities' Request for Public Comment on the Draft Amendment of the 2002 Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases* (Apr. 2006), *available at* http://www.abanet.org/antitrust/at-comments/2006/04-06/comm-ec-leniency.pdf. The Antitrust Section's comments question the efficacy of the Commission's procedure for making oral statements and the planned use of those statements. In particular, the Section cautions against requiring leniency applicants to endorse a transcript that would constitute an admission of liability, noting that "[t]he Commission itself would be summarizing in writing that which its announced policy would implicitly characterize as leniency applicant-endorsed admissions of liability." *Id.* at 11. The Commission's potential use of these applicant-endorsed transcripts as evidence would undermine the objectives of the "paperless" leniency process, according to the Section's analysis: "[I]f the Commission used oral statements – later converted to transcripts that the Commission requires a leniency applicant to review and endorse – as explicit evidence directly relied upon and cited to in documents that do not remain in its internal files, it may cause the very counterproductive outcome its amendments were in part designed to avoid: placing the immunity applicant in a worse position than a party that refuses to cooperate." *Id.* at 11. The Section concluded its comments by suggesting that the Commission "consider alternate means of obtaining 'on the record' evidence" and "forbear in using a leniency applicant's oral statement transcript as cited evidence except where the Commission simply has no other alternative." *Id.* at 12.

evidence.[306] The thorough list of required information and burdensome requirement of submitting evidence in the applicant's possession at the time of the initial application differs greatly from the leniency policies of other jurisdictions. The EC immunity applicant must now pursue an initial internal investigation in order to compile the required information and evidence prior to approaching the Commission. This will significantly slow down the race to the prosecutor as applicants that quickly respond may not obtain immunity because of inadequate evidentiary offerings.[307]

While the 2006 revisions brought the EU's leniency policy closer to the U.S. and Canadian procedures, significant differences remain. In addition to those discussed above, the Commission does not grant fine reductions above 50 percent and does not provide a model immunity or leniency letter that might further the transparency of the process. The leniency policy also contains an evidentiary requirement, rather than requiring simply an admission of the particular collusive conduct and the reporting of all information available to the party with candor and completeness, as many other jurisdictions do. The Antitrust Section and the International Law Section of the ABA expressed concerns with the 2006 Leniency Notice's deviations from other leniency programs:

> The importance of convergence in clarity, transparency, and predictability in leniency programs does not lie solely in the convenience and attractiveness it provides to undertakings weighing the advantages of simultaneously self-reporting in multiple jurisdictions. Rather, the convergence of transparency and predictability has had a positive impact on leniency programs in multiple countries and has enhanced the success of enforcement efforts across jurisdictions. The re-introduction of uncertainty and discretion into the Commission's Draft Notice threatens to have a negative impact on not just the Commission's leniency program, but on leniency programs around the globe, and particularly on the ability of those programs to work in tandem to detect and

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[306] *2006 Leniency Notice*, ¶ 9. Prior to the 2006 revisions, applicants were merely instructed to submit evidence that enabled the Commission to begin an investigation pursuant to Article 14(3) or find infringement pursuant to Article 81. *See 2002 Leniency Notice*, ¶ 8.

[307] In fact, the Antitrust Section and the International Law Section of the ABA are concerned that the burdensome requirements might deter applicants from seeking immunity at all. "From the prospective applicant's viewpoint, the ambiguity associated with the possibility that its disclosures may fall short under the mandatory conditions found in Paragraph 9(a) could reduce the incentive to self-report as soon as wrongdoing is discovered. Alternatively, applicants might elect to forego self-reporting altogether because the information in their possession, while indicative of a cartel arrangement, is thought to be insufficient under the Commission's proposed mandatory requirements and sufficiency standard." *ABA November Comments*, at 7.

punish major international cartels.[308]

It is difficult to assess whether or not these features of the program have sufficiently decreased the incentives to report so as to result in an actual reduction in the number of applications in the EU and, therefore, the number of applicants in other jurisdictions as well. There is simply no way to determine the "but for" number of leniency applications to the Commission as a result of the burdens and uncertainties associated with the EU's revised policy. However, it appears that, over roughly comparable time periods, the actual numbers of applications for leniency have decreased under the revised policy. Under the 2002 Notice (February 2002), the Commission received 107 applications for immunity and 116 applications for leniency; under the 2006 Notice (December 2006), through October 2009, the Commission received 50 applications for immunity and 30 applications for leniency. [309] Still, the authors do not assert there is a necessary correlation between the requirements of the revised policy and the number of applications because the reduction could be due to a number of other factors.

The next big development in leniency in the EU and its member states has been the harmonization among leniency policies, with an eye toward eventually creating what in 2005, Neelie Kroes described as a Commission-wide 'one-stop shop' for leniency applications in cartel cases.[310] The Commission and member states have begun working toward this end within the European Competition Network (ECN), described in Section A.4 above.[311] According to the

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[308] *ABA November Comments,* at 13-14.

[309] Olivier Guersent, *EC Fight Against Cartels: A Balance And An Outlook*, address before the Global Competition Review 2009 Competition Law Review (November 16 -17, 2009).

[310] *See* Neelie Kroes, *The First Hundred Days*, address before the 40th Anniversary of Studienvereinigung Kartellrecht 1965-2005, International Forum on European Competition Law (Apr. 7, 2005). As a first step towards a unified leniency application procedure, the Model Leniency Program was recently drafted as a basis for harmonization of leniency programs throughout the EU. *See* Competition Bureau, *Competition: The European Competition Network Launches A Model Leniency Programme – Frequently Asked Questions*, (Sept. 29, 2006).

[311] *See* Sari Suurnäkki, *OECD Peer Review Gives Positive Assessment On Competition Policy And Enforcement In The European Union*, EC COMPETITION POLICY NEWSLETTER (Summer 2006). For more information on that harmonization process, see Celine Gauer and Maria Jaspers, *The European Competition Network, Achievements And Challenges – A Case In Point: Leniency*, EC COMPETITION POLICY NEWSLETTER (Spring 2006) (hereinafter "European Competition Network"). For a practitioners' discussion of the "one-stop shop" and harmonization of leniency policies among member states and the Commission, see *Roundtable: Cartels – The Future*, GLOBAL COMPETITION REVIEW (May 2006) (hereinafter "2006 GCR Roundtable").

ECN, 24 of the 27 EU Member States now operate leniency programs.[312]

The EU has also begun recently making efforts to improve the transparency and predictability of proceedings. On January 6, 2010, the Commission announced that the Directorate General for Competition had published "detailed explanations concerning how European Commission antitrust procedures work in practice."[313] This explanation is provided in three documents available on the Commission website: Best Practices in Antitrust Proceedings, Hearing Officers' Guidance Paper, and Best Practices on Submission of Economic Evidence.[314] In commenting on these efforts to improve transparency, Neelie Kroes stated: "The Commission has consistently given high priority to due process and fairness in antitrust proceedings. These three documents provide companies with further certainty and transparency about the relationship between them and the Commission during an antitrust case. I warmly invite all stakeholders to provide us with their comments on how to yet further improve our practices."[315]

b) Canada

Canada's immunity policy, Immunity Program Under the Competition Act, ("Immunity Bulletin"),[316] closely mirrors the U.S. policy and, like the U.S. policy, has been highly successful in encouraging cartel participants to come forward. Following several years of experience with its current Immunity Bulletin, the Competition Bureau has begun to revisit certain aspects of its program.

The Competition Bureau adopted most significant changes to its leniency program in the Immunity Bulletin published September 2000, following a period of almost ten years of limited success with an earlier policy that provided for leniency, but not full immunity, from

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[312] *See Authorities in EU Member States Which Operate a Leniency Programme*, *available at* http://ec.europa.eu/competition/antitrust/legislation/authorities_with_leniency_programme.pdf; *Spain Launches Leniency Programme*, GLOBAL COMPETITION REVIEW (Feb. 20, 2008).

[313] *See Antitrust: Improved Transparency and Predictability of Proceedings*, *available at* *http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/2&format=HTML&aged=0&language=EN&guiLanguage=en*.

[314] The three documents are available at http://ec.europa.eu/competition/consultations/2010_best_practices/index.html.

[315] *See Antitrust: Improved Transparency and Predictability of Proceedings*, *available at* *http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/2&format=HTML&aged=0&language=EN&guiLanguage=en*.

[316] Competition Bureau Information Bulletin, *Immunity Program Under the Competition Act* (October 2007) (hereinafter "Immunity Bulletin").

prosecution.[317] The Competition Bureau has since revised and updated its Immunity Bulletin and published the answers to several "Frequently Asked Questions."[318] As in the U.S., immunity in Canada is available to the first party to disclose an offense when the Bureau is either unaware of the activity, or is aware of the activity but does not have sufficient evidence to warrant a referral of the matter to the Attorney General.[319] The applicant then must meet certain requirements that are very similar to the requirements of the U.S. amnesty policy: the applicant must have terminated its participation in the illegal activity; must not have been the instigator or leader of the activity, nor the sole beneficiary of the activity in Canada; it must provide full, continuing, and timely cooperation; and it must provide all information known or available to it, including the identification of any and all offenses in which it may have been involved.[320] Although it is not stated directly in the document, the Immunity Bulletin also provides for an "Immunity Plus" that is very similar to Amnesty Plus in the United States.[321] The Canadian

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[317] Competition Bureau Information Bulletin, *Immunity Program Under the Competition Act* (Sept. 21, 2000). In the period from 1991 to 2000 the Bureau probably received no more than 12 leniency applications, which generated only a small number of cases. In contrast, the Bureau received over 35 immunity applications in the first five years of the new policy. *See* Denyse MacKenzie, *International Cartel Enforcement – Enforcers Sans Frontiers*, address before the Insight International Competition Law Conference (May 15-16, 2006), at 9; Competition Bureau, *Immunity Program Review Consultation Paper* (Feb. 2006), at 3-4. For a fuller discussion of the original leniency policy in Canada, known as the "Cooperating Parties" policy, see Martin Low, *Canada's Immunity Program: One Year Later*, address before the CADE Seminar on Competition Law (Dec. 2001), at 4; Martin Low, *The Competition Bureau's Immunity Program: A View Of Policy And Practice In Canada*, address before IBRAC 7th International Competition Conference (Nov. 23, 2001), at 1-2.

[318] Immunity Bulletin; Competition Bureau, *Immunity Program – Responses To Frequently Asked Questions* (October 2007) (hereinafter "Immunity Program FAQ"). In order to clarify certain aspects of its policy, the Canadian Competition Bureau first issued a set of "Responses to Frequently Asked Questions" about Canada's Immunity Program in 2003. The FAQs were revised and updated in 2005 and, most recently, in 2007. The FAQs provide greater detail about the Competition Bureau's policies with respect to immunity, including the use of markers, the meaning of the requirement that parties report any and all offenses, and the nature of the Bureau's immunity plus program. In many respects the FAQs simply clarify what has already been Competition Bureau practice with respect to certain features of the policy that seem undesirable as written, such as the 30-day deadline. *Id.*

[319] *Immunity Bulletin* ¶ 13.

[320] *Id.* ¶¶ 14-17.

[321] *See* Competition Bureau, *Immunity Program – Responses To Frequently Asked Questions* (Oct. 2007), Question 38 (hereinafter "Immunity Program FAQ").

Immunity Bulletin contains a requirement that the applicant disclose any and all offenses[322] in which it may have been involved or risk losing its immunity for the offenses reported to the Bureau.[323]

One of the most controversial changes to Canada's immunity policy is that parties must now make a detailed proffer describing the conduct for which they are seeking immunity within no more than 30 days of obtaining a marker in most instances.[324] The FAQs indicate that the 30-day period is not a rigid deadline in cases where, for example, the matter is complex and involves multiple jurisdictions, but they still do not provide any guarantee that a party that requests additional time will receive it. This requirement may serve as a disincentive to parties who want to report their conduct as soon as possible after discovering it, but know they will need more than 30 days to conduct a complete investigation.

The FAQs also clarify the Bureau's immunity plus program. If a party is not the first to report on activities in one cartel, but is the first to report on another (or more than one other), it may qualify for immunity in the second (or more) cartel(s) and also reduce the fine it receives in connection with the first cartel.[325]

The recent adjustments to the Immunity Program were adopted in an effort to increase the incentives to apply for immunity, and increase transparency and predictability.[326] To further that effort, the Competition Bureau issued a Consultation Paper in early 2006 seeking public comment on a wide range of topics relating to the Bureau's Immunity Program: the protection of the confidentiality of information submitted as part of the immunity application; the paperless process; potential modifications to the "role in the offense" standard; the application of the policy to current and past directors, officers, and employees; the creation of a penalty plus program; restitution for injured parties; standards for revocation of immunity; the creation of formal leniency program as a companion to the immunity program; and the possibility of

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[322] More specifically, the Bulletin requires an applicant to disclose "any and all conduct of which it is aware, or becomes aware, that may constitute an offence under the [Competition] Act and in which it may have been involved." *Immunity Bulletin* ¶ 17 (emphasis added).

[323] *Id*. ¶ 17. In its 2007 Immunity Bulletin revisions, the Bureau explicitly rejected "Penalty Plus" for failure to disclose other offenses. Instead of increasing penalties for the non-reported conduct, the Bureau chose to revoke immunity for the reported conduct and seek increased penalties for the non-reported conduct. Competition Bureau, *Adjustments to the Immunity Program* (Oct. 2007).

[324] *Immunity Program FAQ,* Question 18.

[325] *Id*. at Question 38.

[326] *See* MacKenzie, *Enforcers Sans Frontiers*, at 10-11.

proactive approaches by the Bureau to potential immunity applicants.[327] The resulting modifications, adopted in October 2007, enhanced the attractiveness of the immunity program to prospective applicants by replacing "the instigator" or "the leader" disqualifications with a coercion disqualification, enhancing protection of immunity applicant confidentiality, and removing the restitution requirement for immunity applicants.[328]

In April 2008, the Competition Bureau issued draft leniency guidelines, the first clarification of what has been an informal procedure in Canada since the adoption of the Immunity Program. The new guidelines continue to grant the first company to apply for leniency full immunity. Under the draft leniency guidelines, the second applicant will receive a reduction in fines of up to 50 percent as well as an exemption from jail time for its employees and officials. Companies who later apply for leniency could receive a reduction in fines of up to 30 percent, so long as they provide information of assistance to the Bureau. Critics warn, however, that the guidelines may pose a risk to companies who do not qualify for outright immunity; in contrast to the procedure that applies to Immunity Program participants, there is no guarantee that the Director of Public Prosecutions will adhere to the recommendations of the Bureau for other leniency applicants.[329]

c) Australia

In June 2003, the Australian Competition & Consumer Commission ("ACCC") issued a leniency policy that was similar in many respects to, but also different in several ways from, the U.S. policy.[330] In September 2005, the ACCC issued a revised policy, with one of its most significant changes reflected in the re-titling of the document as an immunity, rather than a leniency, policy.[331] In June 2009, as part if its new cartel enforcement regime, the ACCC issued

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[327] Competition Bureau, *Immunity Program Review Consultation Paper* (Feb. 2006).

[328] For more information regarding the changes to the Immunity Program, see Competition Bureau, *Adjustments to the Immunity Program* (Oct. 2007).

[329] *Canada Clarifies Leniency Policy*, GLOBAL COMPETITION REVIEW (Apr. 28, 2008).

[330] *ACCC Leniency Policy For Cartel Conduct* (June 2003). In announcing the policy, the ACCC acknowledged its reliance on the successful policies already in place in the U.S., Canada, the EU, and the United Kingdom. *See* Australian Competition and Consumer Commission, Press Release, *ACCC Launches Leniency Policy To Expose Hard Core Cartels In Australia* (June 27, 2003).

[331] Australian Competition and Consumer Commission, *ACCC Position Paper, Review Of Leniency Policy For Cartel Conduct* (Aug. 26, 2005).

an amended Immunity Policy.[332]

The Australian program provides for an offer of conditional immunity from ACCC-instituted court proceedings and penalties to the first company or individual to come forward at any time until the time the ACCC receives written legal advice that it has sufficient evidence to institute proceedings, regardless of whether the ACCC knows about the conduct at the time immunity is sought.[333] Moreover, under the revised policy, the ACCC can also affirmatively approach a cartel participant about the availability of immunity.[334]

The applicant must meet several requirements, which are virtually identical to the requirements of the U.S. policy: it must provide the ACCC with all evidence and information available to it relating to the suspected cartel, cooperate fully and expeditiously throughout the ACCC's investigation and any ensuing proceedings, make admissions and cooperate as a truly corporate act, cease its involvement in the cartel activities,[335] and not have been the clear leader of the cartel or coerced other companies to participate.[336]

The 2005 and 2009 revisions to the policy introduced changes designed to increase

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[332] Australian Competition and Consumer Commission, *ACCC Immunity Policy For Cartel Conduct* (June 26, 2009) (hereinafter "ACCC Immunity Policy"); Australian Competition and Consumer Commission, *ACCC Immunity Policy Interpretation Guidelines* (July 14, 2009) (hereinafter "ACCC Interpretation Guidelines").

[333] The grant of corporate immunity includes all cooperating corporate directors, officers, and employees. The ACCC grants cooperating employees immunity at the same time it grants final immunity to the corporation. *ACCC Immunity Policy* ¶ 9. Subsequent parties or individuals that seek leniency from the ACCC are governed by a cooperation policy that pre-dates the leniency policy. This policy allows the ACCC, at its discretion, to reduce the penalties for parties that meet certain conditions that are similar to the conditions in the leniency policy. Australian Competition and Consumer Commission, *ACCC Cooperation Policy For Enforcement Matters* (July 2002).

[334] *ACCC Interpretation Guidelines* ¶ 39.

[335] The policy provides for the possibility that the ACCC will ask the leniency applicant to "act in a manner which does not disclose ACCC awareness of the cartel" – that is, perhaps, to continue to participate in the cartel – in order to gather evidence against other cartel participants for the ACCC. *ACCC Interpretation Guidelines* ¶ 64.

[336] *ACCC Interpretation Guidelines* § 3.

incentives for self-reporting.[337] The revised policy extends the availability of amnesty until the time the ACCC receives legal advice that it has enough evidence to bring a case.[338] The revisions also extend amnesty to all current and former employees of the company. Most importantly, the revised policy removes one of the most controversial requirements of the previous policy, the necessity of a written application.[339] It also provides for hypothetical applications, so that potential applicants can inquire about the availability of immunity; a marker system, whereby applicants can hold their place in line while investigating the scope and nature of the anticompetitive conduct; and Amnesty Plus. The policy also provides for the revocation of an immunity agreement should the applicant fail to comply with the requirements of the policy, and allows another company to apply for immunity should the first applicant be unwilling or unable to meet the requirements.[340]

Like the Canadian Competition Bureau, the ACCC has a time limit on the "redemption" of markers. The ACCC's time limit for a marker is 28 days, but it has indicated that the marker period may be even shorter than 28 days under certain circumstances.[341] Like the Competition Bureau, however, the ACCC has indicated that there is some flexibility in the marker period if the ACCC has not yet initiated an investigation or if the applicant can demonstrate that its internal investigation will be complex.[342]

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[337] *See id.* § 1.2; *see also* Mark Pearson, *address before the Thomas Playford Trade Practices Act Responsibilities And Challenges Seminar* (hereinafter "Thomas Playford speech") (Nov. 22, 2005), at 4.

[338] This is in contrast to the old policy, which permitted the granting of full immunity only if the ACCC was unaware of the cartel.

[339] The ACCC had, in practice, permitted oral applications under the old policy.

[340] For a fuller discussion of the new immunity policy and other facets of Australia's enforcement scheme, see Graeme Samuel, *Cartel Reform And Compliance With The Trade Practices Act* (Nov. 13, 2009) (hereinafter "*Cartel Reform*"); Graeme Samuel, *Key Developments In Antitrust Regulation In Australia*, address before the 2nd Antitrust Spring Conference (Apr. 28, 2006) (hereinafter "*Key Developments*"); Pearson, *Thomas Playford Speech*; Graeme Samuel, *The Enforcement Priorities Of The ACCC*, address before the Competition Law Conference (Nov. 12, 2005); Graeme Samuel, *The ACCC Approach To The Detection, Investigation & Prosecution Of Cartels*, address before the Economics Society of Australia Detection of Cartels Symposium (Sept. 28, 2005).

[341] The ACCC has indicated, for example, that it may grant a shorter marker when the applicant has delayed reporting, or when its investigation has already significantly advanced. *See ACCC Interpretation Guidelines*, ¶ 28.

[342] *Id.*

Because of the issues created by criminalization of cartel conduct in Australia, the ACCC has signed a Memorandum of Understanding (MOU) with the Commonwealth Director of Public Prosecutions (CDPP). The MOU outlines when the ACCC will refer a case to the CDPP for prosecution. Similarly, while the ACCC will manage immunity requests in both civil and criminal matters, it will only decide whether to grant immunity in civil cases, For criminal cases, the ACCC will make a recommendation to the CDPP regarding qualification for immunity in criminal proceedings. After receiving this recommendation, the CDPP will determine whether or not to grant immunity.[343]

d) United Kingdom

The United Kingdom, which has both a corporate leniency and individual immunity policy, is one of the most experienced EU member states in terms of leniency and cartel enforcement. The two leniency policies complement the civil enforcement scheme for corporations and the criminal enforcement scheme for individuals who engage in cartel conduct. The United Kingdom originally introduced a corporate leniency program modeled on the U.S. policy in March of 2000.[344] In the summer of 2005, the U.K.'s Office of Fair Trading (OFT) issued an Interim Note to clarify certain aspects of its existing corporate leniency policy.[345] Most recently, in December 2008, the OFT published a Guidance Note setting out "the detail of how the OFT will handle applications under the OFT's existing published civil leniency and no-action policies."[346] Except for some significant amendments to the OFT's no-action guidance, the Guidance Note only supplemented and elaborated on the previous publications.[347]

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[343] Memorandum of Understanding Between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission Regarding Serious Cartel Conduct (July 13 and 14, 2009); Graeme Samuel, *Cartel Reform*, at 7.

[344] Office of Fair Trading, *Director General Of Fair Trading's Guidance As To The Appropriate Amount Of A Penalty* §§ 3.3-3.7 (hereinafter "OFT Penalty Guidance"). For an explanation of the U.K.'s 2002 leniency program, see Office of Fair Trading, *Leniency In Cartel Cases: A Guide To The Leniency Programme For Cartels* (2005) (hereinafter "Leniency Guidance"). The OFT's policy on individual immunity is laid out in Office of Fair Trading, *The Cartel Offence, Guidance On The Issue Of No-Action Letters For Individuals* (Apr. 2003) (hereinafter "OFT Guidance on No-Action Letters"). Both of these policies are supplemented by the Interim Note.

[345] Office of Fair Trading, *Leniency And No-Action: OFT's Interim Note On The Handling Of Application*s (July 2005) (hereinafter "Interim Note"). The Interim Note addresses both corporate and individual leniency.

[346] Office of Fair Trading, *Leniency and No-Action: OFT's Guidance Note on the Handling of Applications* (Dec. 2008), at 7.

[347] *See id.*

Like the U.S. policy, the U.K. leniency program provides total immunity from fines for the first member of a cartel to come forward with relevant information. As in the U.S., Canada, and other jurisdictions, the entity reporting its conduct must meet several conditions: it must cease participation in the cartel; provide all information, documents and evidence available to it regarding the existence and activities of the cartel; and cooperate fully and continuously throughout the investigation.[348] The policy also provides for reductions in fines for entities that are not the first to come forward or who do not meet all of the conditions above.[349] The U.K. also has a "Leniency Plus" policy based on, and very similar to, the Amnesty Plus policy in the United States.[350] A party who has received 50 percent leniency or less in one matter, and who informs the OFT of additional cartels or price fixing arrangements and qualifies for 100 percent leniency in the new matter, can increase its leniency in the first matter.[351] The U.K. also has a related policy on immunity from criminal prosecution, in the form of no-action letters, for individuals who have engaged in criminal cartel conduct.[352]

The July 2005 Interim Note made some key changes to the U.K. leniency policy designed to attract more corporate and individual applicants by making the process more clear and fair.[353] The resulting policy is quite similar to the U.S. and Canadian models, in that it allows counsel to make hypothetical inquiries regarding the availability of leniency; creates a marker system for applicants to reserve their place in the leniency queue; and provides certain or nearly certain immunity for individuals depending on when in the OFT's investigation the company approaches the OFT for immunity.[354]

The primary revisions suggested in the November 2006 Draft Note provide additional guidance to cartel members considering "parallel leniency approaches to the European commission and the OFT in respect of cartel activity that may affect trade between EU member

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[348] *See Leniency Guidance*, at 7.

[349] *Id.* at § 3.8.

[350] *Id.* at §§ 3.10 – 3.11; *see also Interim Note* at ¶¶ 6.8-6.11.

[351] *OFT Penalty Guidance* at §§ 3.10 – 3.11.

[352] Enterprise Act § 190; *see also OFT Guidance On No-Action Letters* at § 3.4; *Interim Note* at § 4.

[353] For a detailed explanation of the revised policy, see Simon Williams, *The Investigation Of Cartels In The U.K.: Some Current Issues*, address before the IBC U.K. Competition Law Conference (Dec. 1, 2005).

[354] The Interim Note and related speeches by OFT officials provide extensive guidance on the policy, consistent with the Interim Note's stated approach that the OFT hopes to be accessible and approachable with its policy.

states."[355] The Draft Note assures applicants that information proffered in order to gain leniency will not increase liability exposure in other jurisdictions or jeopardize leniency applications in other jurisdictions. Notably, the Draft Note would also bring the U.K. leniency policy even closer to the U.S. and Canadian models by allowing no-names markers as further protection for early applicants who wish to preserve an early reporting date but also complete a thorough internal investigation before presenting incriminating information to the OFT.[356]

In December 2007, British and American authorities cooperated to allow three British oil industry executives who conspired to fix the price of marine hoses to plead guilty to U.S. conspiracy charges in Texas, and then to travel to the UK to plead guilty and serve their sentences in their home country. The agreements, as discussed in Section IV.2.b. above, were heralded as "unprecedented in criminal law enforcement," demonstrated the continuing convergence in leniency policies across the globe, and underscored the overarching increase in cooperation in international cartel enforcement.[357]

e) Japan

In April 2005, after more than a year of debate and opposition, the Japanese parliament passed amendments to the Anti-Monopoly Act designed to enhance the JFTC's ability to detect and deter anticompetitive behavior in Japan.[358] These changes are the most significant revisions of the Antimonopoly Act since the late 1970s, and former Secretary-General Akinori Uesugi of the JFTC has observed that they will "force very drastic changes in [Japanese] legal thinking as well as business behaviors."[359] The amendments, which took effect on January 4, 2006,

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[355] *Draft Note* at 4; see also §§ 4.33-4.55.

[356] Id. at §§ 2.18-2.20.

[357] *UK Execs Face Criminal Prosecution*, GLOBAL COMPETITION REVIEW (Dec. 12, 2007); *see also UK Brings Criminal Charges Against Executives*, GLOBAL COMPETITION REVIEW (Dec. 19, 2007).

[358] For a summary of the amendments, see Japan Fair Trade Commission, Press Release, *The Bill To Amend The Antimonopoly Act Approved* (Apr. 20, 2005). *See also* Kazuhiko Takeshima, *Keynote Speech: Recent Developments In Antimonopoly Law In Japan*, address before the IBA and Japan Federation of Bar Associations International Competition Enforcement Conference (Apr. 20, 2005); Akinori Uesugi, *Enforcement of Competition Laws In Japan*, address before the IBA and Japan Federation of Bar Associations International Competition Enforcement Conference (Apr. 20, 2005) (hereinafter "Enforcement of Competition Laws").

[359] *See* Akinori Uesugi, *Enforcement Activities Against Cartels – What Is Going On In Japan?*, address before the ABA Section of Antitrust Law International Cartel Workshop (Feb. 5, 2004) (hereinafter "Uesugi, Enforcement Activities"), at 5; *see also* Akinori Uesugi, *Recent*

[Footnote continued on next page]

introduced a leniency program for the first time,[360] which the JFTC has recognized as a critical tool in international cartel enforcement.[361]

Applicants are required to fax a short initial written application to the JFTC describing the nature of the goods or services affected, the parties involved, the conduct and its duration. Applicants must then submit a second, more detailed form describing the conduct in detail sufficient to enable the JFTC to begin an investigation, but the policy does contemplate that the information in the second form can be provided orally in exceptional circumstances relating to concerns about discovery of written materials in civil litigation.[362]

In June 2009, Japan amended its Anti-Monopoly Act to increase the number of allowable leniency applicants. The amended rules provide for a 100 percent reduction in surcharges for the first company that applies for leniency *before* the JFTC begins an investigation and a 50 percent reduction for the second company that applies for leniency *before* the JFTC begins an investigation. It then allows for a 30 percent reduction for the next three companies that apply for leniency either before or after the JFTC begins an investigation. This change increased the number of allowable leniency applicants to a total of five, a marked increase over the previous cap of only three. If no company applies before the investigation start date, the first three

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[Footnote continued from previous page]
Developments In Japanese Competition Policy - Prospect And Reality, address before the ABA Section of Antitrust Law International Antitrust Forum (Jan. 24, 2005) (hereinafter "Recent Developments"). For interesting discussions of the changes in Japan's approach to competition law amid larger structural reforms in the Japanese economy generally, see Kazuhiko Takeshima, *Toward The New Design Of Competition Policy In Japan*, address before the ABA Section of International Law and Practice and Section of Antitrust Law (Sept. 18, 2003), and Uesugi, *Enforcement Activities*.

[360] Japan Fair Trade Commission, *Rules On Reporting And Submission Of Materials Regarding Immunity From Or Reduction Of Surcharges* (Oct. 6, 2005). For a lengthy and thoughtful discussion and explanation of the new policy, see Akinori Uesugi, *A Leniency Program A La Japonnaise – How It Is Going To Be Enforced*, address before the ABA Section of Antitrust Law Fall Forum (Nov. 16, 2005) (hereinafter "Leniency Policy A La Japonnaise"). For an analysis by practitioners of the key features of the JFTC's new policy, see Shigeyoshi Ezaki and Vassili Moussis, *Leniency For Japan*, GLOBAL COMPETITION REVIEW (Dec. 2005) (hereinafter "Leniency For Japan").

[361] *See* Uesugi, *Enforcement Of Competition Laws*, at 8-9. For a very interesting view from another JFTC enforcer of the state of Japan's international cartel enforcement efforts prior to the new legislation and the impact of Japan's previous lack of a leniency policy on those efforts, see Funahashi Kazuyuki, *International Cooperation To Crack International Cartels: Japanese Successes And Failures*, address before the ACCC Cracking Cartels conference (Nov. 24, 2004).

[362] *See* Uesugi, *Leniency Program A La Japonnaise*, at 9.

eligible companies who apply for leniency *after* the JFTC begins an investigation will receive a 30 percent reduction in their fines.[363]

The JFTC's program constitutes a huge step forward but still has some downsides, most notably the requirement of an initial written application and the lack of certainty with respect to the availability of oral procedures following the initial application. The JFTC has obviously taken notice of concerns expressed about the writing requirements of the policy,[364] by revising its initial proposal to allow greater use of oral applications. Secretary-General Uesugi has also explained in some detail that a writing is necessary in order to ensure that the submission is an act of the company and not a whistle-blowing employee acting without management authorization.[365] He has also explained that certain distinctive features of the JFTC's policy relate to cultural differences and concerns expressed during the debate over the introduction of the policy.[366] Unfortunately, regardless of the explanation, even this relatively limited writing requirement is likely to serve as a disincentive for self-reporting under the policy.

Furthermore, it is the authors' understanding that applicants may be requested to sign the JFTC's notes of the subsequent oral presentation.[367] Such a procedure has the effect of creating a discoverable record that applicants are trying to avoid by proceeding in a paperless fashion; defense counsel have been wrestling with this type of procedure in the EU for several years. The revised program also does not provide for an Amnesty Plus-type program, which is disappointing in the context of the movement towards international convergence in leniency programs and the recognition of the need for similarity among policies, given that decisions made by international cartel participants about whether to self-report and cooperate with enforcement authorities are *global* decisions.

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[363] Japan Fair Trade Commission, *Summary of the Amendment to the Antimonopoly Act* (June 2009), available at http://www.jftc.go.jp/e-page/pressreleases/2009/June/090603-2.pdf.

[364] Both the IBA and the ABA, among other organizations, submitted comments on the proposed leniency policy before it became final, noting in particular the disincentives created by the requirement of a written submission. *See* International Bar Association, *Working Group Submission On The Japan Fair Trade Commission (JFTC) Proposed Rules On Reporting And Submission Of Materials Regarding Immunity From Or Reduction Of Surcharges* (Aug. 2, 2005); *Joint Submission Of The American Bar Association's Sections Of Antitrust Law And International Law On The Japan Fair Trade Commission's Draft Rules On Reporting And Submission Of Materials Regarding Immunity From Or Reduction Of Surcharges Implementing The Amended Act Concerning Prohibition Of Private Monopolization And Maintenance Of Fair Trade* (Aug. 2, 2005).

[365] *See* Uesugi, *Leniency Program A La Japonnaise*, at 7-8.

[366] *See id.* at 2 and 7-8.

[367] *See* Ezaki and Moussis, *Leniency For Japan*.

Still, Japan has shown a strong dedication to anti-cartel enforcement, with the enactment of increased penalties[368] and a leniency policy, a willingness to explain its policy, and a commitment to making it work. The program, which many in the Japanese business community viewed as a negative development, got off to a strong start, with 26 leniency applications in the program's first three months.[369] In addition to the initial stampede of applicants, the JFTC continues to average four or five applications every month.[370] The success of JFTC's leniency program has created a set of JFTC's exposure and opportunity factors to which counsel should give serious consideration in making The Decision.

f) Korea

Korea introduced a leniency program in 1997, but it attracted few applicants, due at least in part to the fact that leniency was not guaranteed and the level of fine reduction was not certain.[371] In 2005, the KFTC revised its policy to make it more attractive for applicants.[372]

The revised amnesty policy provides a 100 percent reduction of the surcharge for the first party to self-report or cooperate and meet certain conditions, and a 30 percent reduction for the second party to cooperate and meet certain conditions. It also includes a marker system for

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[368] In January 2007, fines increased from 6 to 10 percent of the company's annual revenue attributable to the relevant product or service. In May 2007, the Japanese government recommended even higher fines for cartelists, with a possible 30 to 50 percent increase. In June 2009, Japan again increased fines for cartelists by 50%, from 10% to 15%. *See* Japan Fair Trade Commission, *Summary of the Amendment to the Antimonopoly Act* (June 2009), available at http://www.jftc.go.jp/e-page/pressreleases/2009/June/090603-2.pdf.

[369] Fair Trade Commission of Japan, *Processing Status Of The Antimonopoly Act Enforcement In FY2005* (May 31, 2006), at 1.

[370] See Japan Fair Trade Commission, *Message from Chairman Takeshima* (January 10, 2007); Kazuhiko Takeshima, *Japan's Endeavour For Establishing Rigorous Anti-Cartel Enforcement*, remarks for the IBA's Global Forum on Competition and Trade Policy Conference (Nov. 4, 2006), at 2.

[371] Korea Fair Trade Commission, *Recent Changes To Korea's Cartel Enforcement Regime* (May 31, 2005) (hereinafter "Recent Changes").

[372] *See* Monopoly Regulation and Fair Trade Law, Article 22-2; Monopoly Regulation and Fair Trade Law, Enforcement Decree, Article 35, *Criteria For The Mitigation Of Or Exemption From Punishment For Informants, Etc.* (as amended, Mar. 31, 2005); Korea Fair Trade Commission, *Significant Improvement Of Leniency Program For Those Who Confess Cartel Activities*, KFTC NEWS (May 2005) (hereinafter "KFTC News, May 2005"). For a clear explanation of the features of the new policy, *see also* Kyung Taek Jung, *Korea*, LENIENCY REGIMES (2005).

applicants to hold their place in line, automatic leniency for parties who satisfy the policy's requirements, and Amnesty Plus for applicants who disclose additional cartel activities. In addition, the revised policy allows parties who cooperate but do not qualify for leniency to reduce their surcharges by up to 15 percent.

In 2006, the KFTC incorporated additional revisions into its leniency policy to make voluntary reporting more simple, including allowing oral applications.[373] And in August 2007 the KFTC published plans to improve its leniency program by automatically reducing by 50 percent the administrative fine given to the second party to self-report, a greater incentive than the previous 30 percent reduction.[374] Korea's leniency policy has already shown some success. In the eight-year period from its adoption through 2004, the old leniency policy attracted only seven applicants.[375] In 2005 alone, the KFTC received eleven leniency applications,[376] and the authors' understanding is that the number has increased since then.

With the August 2007 updates, the KFTC will not grant leniency to a company that forces rivals to join a cartel or which keeps others from exiting that cartel. This is a departure from the previous law, under which parties that lead a cartel or coerce others to join may still qualify for leniency.[377]

The KFTC's leniency program recently survived a challenge presented by, strangely enough, the Seoul Prosecutors' attempt to impose criminal sanctions on leniency applicants. In July 2007, the KFTC assessed fines totaling approximately $54 million against three sugar producers for fixing the price of sugar between 1991 and 2005. One of those producers, CJ Corporation, was the leniency applicant and qualified for total immunity from fines. But the Seoul Prosecutors' Office attempted to use KFTC's decision to bring criminal prosecutions against all three sugar producers, including the immunity recipient CJ Corporation. On February

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[373] Korea Fair Trade Commission, *Notification on Implementation of Leniency Program* (Jul. 2006); *see also KFTC Amends Leniency Program for Reporting of Cartels* (Nov. 23, 2006), http://www.abanet.org/antitrust/at-committees/at-s1/pdf/breaking-news/2006/11/11-23-06.pdf. The 2006 amendments also included extending supplementation period after simplified lenience application, and allowing leniency applications even when there is a report filed by a third party. *Id.*

[374] Global Competition Review, *Korea Moves to Improve Leniency* (Aug. 14, 2007), *available at* http://www.globalcompetitionreview.com.news/news_item.cfm?item_id=5609.

[375] KFTC, *Recent Changes*, at 3.

[376] Joseph Seon Hur, *Recent Developments of Antitrust Enforcement of Korea Fair Trade Commission*, address at George Mason Law Review's Antitrust Symposium (Sept. 13, 2006), *available at* http://www.law.gmu.edu/gmulawreview/News/documents/HurJosephSeon.pdf.

[377] GCR, *Korea Moves to Improve Leniency*.

12, 2008, the Seoul Central District Court dismissed the case against CJ Corporation, ruling that the KFTC's grant of immunity prohibited government prosecution.[378] Although the attempted prosecution introduced uncertainty about the value of applying for leniency in Korea during this seven-month period, the District Court restored the credibility of the KFTC's leniency program.

Despite this affirmation that leniency applicants will avoid prosecution, however, the policy still contains requirements that will give some pause to companies considering a leniency application to the KFTC in an international cartel matter. One such requirement is that the applicant must submit the application and evidence only seven days from the time it places a marker. This policy has the effect of creating a race, as the KFTC intended,[379] but it does not comport with the realities of an international cartel investigation.

g) South Africa

In May 2008, South Africa implemented a new corporate leniency policy that formalized several of the practices already followed by its Competition Commission. Mirroring international enforcement trends, the new policy allows for the submission of oral statements and introduces a marker system.[380] The new policy is intended to "quell the fears" of potential applicants by eliminating some of the "unpredictability" of leniency applications under the previous process, and is expected to increase the number of applications and to enhance the policy's overall efficacy.[381]

2. Increased Enforcement Worldwide

A sampling of recent enforcement actions around the world demonstrates the growing scope of cartel enforcement around the globe. The U.S., the EU, and Canada remain the primary jurisdictions of concern in most international cartel investigations, but other jurisdictions are beginning to assert their enforcement authority in a way that should capture counsel's attention.

The U.K. In 2006, the OFT secured a number of fines in cases involving cooperation by leniency applicants, including fines on 13 roofing contractors for a total of £1.6 million after leniency for fixing prices on roofing and surfacing contracts. The first defendant to cooperate received 100 percent leniency, and six other defendants who cooperated received reductions in

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[378] *No Criminal Charges Against Korean Leniency Applicants*, GLOBAL COMPETITION REVIEW (Feb. 20, 2008). The District Court's ruling also prohibited the criminal prosecution of two leniency applicants in another case. *Id*.

[379] *Id*. at 4.

[380] *South Africa Introduces New Leniency Policy*, GLOBAL COMPETITION REVIEW (May 27, 2008).

[381] *Id.*

their fines.[382] In April 2006, the OFT fined two companies £168,000 – reduced from £2.1 million by leniency – for price-fixing and market allocation relating to stock check pads. One defendant received full leniency, and the second received 50 percent leniency.[383] Then in June 2006, the OFT fined four companies a total of £900,000 after leniency for price-fixing and market allocation in the market for aluminum spacer bars. One of the defendants received 100 percent leniency, and a second defendant received 40 percent leniency.[384]

In December 2007, under the U.K.'s direct settlements program, six of the supermarkets, dairy processors, and retailers implicated in the OFT's dairy cartel investigation agreed to pay fines totaling more than £116 million. In exchange for a reduction in fines, the companies agreed to cooperate with the OFT as it continued its investigation.[385]

In April 2008, the OFT concluded the largest cartel investigation in the Office's history, charging 112 British construction firms with conspiring to rig bids and fix prices. The OFT raided 57 businesses and took in 37 separate leniency applications during its four-year bid-rigging probe. The companies charged could face fines of up to 10 percent of their annual turnover and, under U.K. law, prison sentences could be imposed upon executives thought to have organized the alleged cartel.[386] In September 2009, the OFT levied its latest significant fine: £130 million on 100 construction firms for allegedly colluding with competitors on building contracts.[387]

In June 2008, as discussed at length above, the U.K. Crown Court imposed the first-ever prison sentences for criminal violations of the country's Enterprise Act of 2002. In addition to jail time, the former executives were barred from acting as company directors for between five

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[382] Office of Fair Trading, Press Release, *OFT Fines Scottish Roofing Contractors In England And Scotland* (Feb. 23, 2006).

[383] Office of Fair Trading, Press Release, *OFT Fines Check Pads Suppliers Guilty Of Price Fixing* (Apr. 4, 2006).

[384] Office of Fair Trading, Press Release, *Double Glazing Raw Materials Distributors Fines For Involvement In Cartel* (Jun. 29, 2006).

[385] *Supermarkets and Dairies Reach UK Cartel Settlement*, GLOBAL COMPETITION REVIEW (Dec. 7, 2007).

[386] *OFT Charges Alleged Construction Cartel*, GLOBAL COMPETITION REVIEW (Apr. 17, 2008).

[387] Christopher Norton, *UK Agency Lays £130M Fines on Bid-Rigging Builders*, COMPETITION LAW 360 (Sept. 22, 2009).

and seven years.[388] Although the U.K. Court of Appeal reduced their sentences in November 2008 to conform to the sentences agreed to by the executives in the United States, they remain significant at 20-, 24-, and 30-months, respectively.[389]

Also in June 2008, the OFT announced that it had conducted raids of Royal Bank of Scotland and Barclays as part of an ongoing investigation into possible price-fixing in their professional services loans operations.[390]

In August 2008, as mentioned above in Section IV.2.d, the OFT brought criminal charges against four current and former British Airways executives, marking the first time it has instigated a prosecution against individuals under the Enterprise Act of 2002. The executives were charged with fixing the prices of fuel surcharges for passenger flights.[391]

Japan. Throughout 2005 and 2006, the JFTC brought criminal prosecutions against a number of firms involved in rigging bids for steel bridge projects. In March 2006, it fined 44 companies a total of ¥12.9 billion, or approximately US $110 million, for their involvement in rigging bids on a number of these projects. Proceedings are ongoing against other companies.[392]

In August 2006, the JFTC granted leniency for the first time, to three participants in a bid-rigging scheme involving ventilation systems used in road tunnels. It granted full immunity to one of the parties, Mitsubishi Heavy Industries, and 30 percent reductions to two other members of the conspiracy.[393] In December 2008, it charged three Japanese sheet steel makers with price fixing in only the second criminal prosecution to result from a leniency application.[394]

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[388] *Marine Hose Three Sentenced*, GLOBAL COMPETITION REVIEW (June 11, 2008); *see also Judge Will Respect UK-US Marine Hose Deal*, GLOBAL COMPETITION REVIEW (June 10, 2008); *UK Brings Criminal Charges Against Executives*, GLOBAL COMPETITION REVIEW (Dec. 19, 2007).

[389] *Court Shrinks Sentences of Marine Hose Three*, GLOBAL COMPETITION REVIEW (Dec. 1, 2008).

[390] *OFT Raids Banks*, GLOBAL COMPETITION REVIEW (June 2, 2008).

[391] *OFT Accuses BA* Executives, GLOBAL COMPETITION REVIEW (August 7, 2008).

[392] Japan Fair Trade Commission, Press Release, *The JFTC Surcharged 44 Participants In The Bid-Rigging For Steel Bridge Construction Projects* (Mar. 27, 2006).

[393] *Leniency Flourishes In Japan*, GLOBAL COMPETITION REVIEW (Aug. 25, 2006).

[394] *Japan Files Criminal Charges Against Steel Companies*, GLOBAL COMPETITION REVIEW (Dec. 10, 2008).

The Japanese Ministry of Economy, Trade, and Industry (METI) very recently announced plans to formally ask the JFTC to increase aggressive enforcement of its Anti-Monopoly Law on foreign businesses through extraterritorial application of the law.[395] In February 2008, the JFTC leveled a cease order to the five makers of marine hose, including British, French, and Italian manufacturers.[396] It was the first time that the JFTC has enforced its Anti-Monopoly Act on companies outside Japan.[397]

South Korea. In May 2006, the KFTC fined the three largest mobile phone companies in Korea a total of 1.78 billion won ($1.88 million USD) for colluding to end the practice of flat-rate telephone calls.[398] The KFTC later fined Motorola Korea 696 million won ($729,000 USD) in March 2008 for facilitating the collusion between the three companies.[399]

In March 2008, the KFTC imposed 6.42 billion won ($6.3 million USD) in fines against eight banks for fixing foreign currency commission fees.[400] The KFTC conducted 58 dawn raids in 2006, and fined companies engaged in cartel activity a total of €88 million.[401] Between January 2007 and June 2008, the KFTC imposed fines of 177 billion won ($164 million USD) on companies in the petrochemical sector. In June 2008, eight companies were fined 12.7 billion won ($11.7 million USD) for fixing the prices of chemicals used in the manufacture of solvents, fuels, and synthetic materials between 2000 and 2004. All eight companies applied for leniency, and their fines were reduced according to the order in which their applications were received.[402]

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[395] *Id.*

[396] *Japan Targets Foreign Cartelists for the First Time*, GLOBAL COMPETITION REVIEW (Mar. 3, 2008).

[397] *Id.*; *see also Japanese Trade Ministry Will Press for Extraterritoriality of Anti-Monopoly Law*, BNA ANTITRUST & TRADE REGULATION REPORT (Jan. 18, 2008), *available at* http://pubs.bna.com/ip/bna/atr.nsf/eh/a0b5r3p9z1.

[398] Korean Fair Trade Commission, Press Release, *3 Mobile Providers Hit With Fines For Collusion* (May 19, 2006).

[399] *Korea Fines Motorola*, GLOBAL COMPETITION REVIEW (Mar. 11, 2008).

[400] Shannon Henson, *South Korea FTC Goes After Banks*, available at www.competition.law360.com (Mar. 31, 2008).

[401] *Korea Moves to Improve Leniency*, GLOBAL COMPETITION REVIEW (Aug. 14, 2007).

[402] *Korea Fines Third Petrochemicals Cartel*, GLOBAL COMPETITION REVIEW (June 24, 2008).

More fines followed. In September 2008, the KFTC fined five elevator companies 38.2 billion won ($43 million USD) for their role in the international elevator cartel.[403]

In December 2008, the KFTC issued a decision fining four paper manufacturers 3.9 billion won ($3 million USD) for their role in a copy paper cartel. The investigation was the KFTC's first since creating its international cartel division in March 2008, and was the first investigation initiated by the KFTC without prompting by the U.S. DOJ or EC.[404] In 2009, the KFTC continued to impose significant fines: in August, the KFTC fined Korean soft drink companies a total of 25.5 billion won ($20.3 million USD) for alleged price-fixing, and in May, the KFTC became still another competition authority to impose fines in the marine hose cartel, imposing fines of over 1.1 billion won ($449,000 USD).[405]

Australia. In 2006, Australia's Competition and Consumer Commission (ACCC) issued five cartel decisions, imposing a total of €10.7 million.[406] In July 2007, an Australian federal judge imposed AUS $9 million ($8 million USD) in fines on 11 air-conditioning companies that were found guilty of price-fixing from 1991 to 2003.[407] In November 2007, a federal judge issued Australia's largest-ever fine in a cartel case. The judge fined cardboard manufacturer Visy Group and several officials, including owner Richard Pratt, more than AUS $40 million ($37 million USD) for fixing prices and sharing market information with rival Amcor Limited.[408] In June 2008, the ACCC launched criminal proceedings against Pratt, charging that he provided false evidence during the price-fixing investigation.[409]

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[403] Jacqueline Bell, *KFTC Issues $43M Fine Against Otis Elevator, Others*, COMPETITION LAW 360 (Sept. 9, 2008).

[404] *KFTC Fines Asian Paper Cartel*, GLOBAL COMPETITION REVIEW (Dec. 22, 2008).

[405] Allison Grande, *KFTC Fines Drink Makers $20M Over Price-Fixing*, COMPETITION LAW 360 (Aug. 17, 2009); Melissa Lipman, *KFTC Fines 4 Marine Hose Cos. Over Cartel*, COMPETITION LAW 360 (May 18, 2009).

[406] *ACCC Seeks Criminal Penalties*, GLOBAL COMPETITION REVIEW (JUNE 26, 2007).

[407] *Aussie Judge Fines Air-Con Cartel*, GLOBAL COMPETITION REVIEW (July 26, 2007).

[408] *Record Cartel Fine Brings Call for Change in Australia*, GLOBAL COMPETITION REVIEW (Nov. 7, 2007). The record fines followed a settlement agreement Visy reached with the ACCC. Amcor received leniency for blowing the whistle in 2004. Visy Group now faces a civil action in New Zealand for its involvement in cartel activity in the country's corrugated-fiber packaging industry. *Visy Facing Further Charges Down Under*, GLOBAL COMPETITION REVIEW (Nov. 22, 2007).

[409] *ACCC Prosecutes Pratt*, GLOBAL COMPETITION REVIEW (June 23, 2008).

In March 2008, an Australian federal court fined a timber cartel more than AUS $2.5 million for conspiring to fix the price of widely used wood chemicals. The leniency applicant, Arch Wood Protection, was granted immunity from prosecution in exchange for its cooperation with the ACCC.[410] In December 2008, the ACCC followed these fines with a $25 million fine on two airlines involved in a global fuel surcharge cartel.[411] A few months later, in February 2009, the ACCC fined Martinair Holland NC, Cargolux International Airlines SA, and Air France-KLM a combined $16 million in fees for their alleged roles in the global fuel surcharge cartel.[412]

In July 2008, Graeme Samuel, Chairman of the ACCC, a strong advocate of anti-cartel enforcement and a highly visible enforcer in the international cartel arena, was reappointed for a three-year term.

South Africa. In Spring 2006, South Africa's Competition Commission (SACC) signed consent agreements with South African Airways (SAA) and Lufthansa in which they each agreed to pay fines for price-fixing. Lufthansa agreed to pay a fine of R8.5 million (approximately $1.2 million USD) for fixing prices with SAA on flights between South Africa and Frankfurt.[413] SAA agreed to pay a fine totaling R40 million (approximately $5.6 million USD) for price-fixing on airline tickets with Lufthansa and for fixing the prices of airline fuel surcharges.[414] The fuel surcharge case was brought with the assistance of South Africa's first leniency applicant, Comair, which received immunity from prosecution.[415]

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[410] *ACCC Burns Timber Cartel*, GLOBAL COMPETITION REVIEW (Mar. 26, 2008).

[411] Christine Caulfield, *Qantas, BA Fined $25M Over Fuel Surcharge*, COMPETITION LAW 360 (Dec. 11, 2008); Shannon Henson, *Qantas, BA Make Deals to End Aussie Probe*, COMPETITION LAW 360 (Oct. 29, 2008).

[412] Shannon Henson, *Australia Fines Airlines $16M In Price-Fixing Probe*, COMPETITION LAW 360 (Feb. 17, 2009).

[413] Competition Commission South Africa, Press Release, *SAA Signs Three Consent Agreements With The Commission* (May 24, 2006).

[414] Competition Commission South Africa, Press Release, *Lufthansa Signs Consent Agreement With The Commission* (May 31, 2006).

[415] Competition Commission South Africa, Press Release, *The Commission Refers Collusion Allegations Against SAA, SA Express, SA Airlink And Nationwide To The Tribunal For Ruling* (Mar. 22, 2005).

In the Fall of 2007, the SACC fined Tiger Brands R99 million ($15 million USD) for its participation in a bread cartel. The amount, agreed to as part of a settlement with Tiger Brands, is 5.7 percent of the company's 2006 turnover.[416]

In April 2008, the Competition Commission imposed its largest uncontested fine ever – a fine of R146 million ($18.9 million USD) levied against scrap metal company New Reclamation Group for price-fixing, equal to 6 percent of the company's annual turnover.[417] In May 2009, the SACC fined South Africa-based Sasol Chemical Industries Ltd. 188.01 million rand ($22.7 million USD) to settle claims based on participation in a fertilizer cartel; that fine was later increased to 250.68 million rand ($29.8 million USD) upon the discovery of new information suggesting greater anticompetitive effects.[418]

Germany. In two separate matters in May and September of 2005, the Bundeskartellamt, Germany's Federal Cartel Office, imposed a total of over €150 million on seventeen insurance companies for their participation in cartel activities intended to reduce competition in various sectors of the insurance market.[419] This amount was surpassed by an approximate €208 million fine secured against seven gas companies in December 2007 for colluding to preserve customers and stifle competition.[420] The Bundeskartellamt also imposed its highest fine ever in December 2007, charging two television companies €216 million for abuse of market dominance.[421]

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[416] *South Africa Charges Bread Cartel*, GLOBAL COMPETITION REVIEW (Nov. 13, 2007). Premier Foods was granted conditional immunity for its participation in both the milling and bread cartels after applying for leniency. Tiger Brands was granted leniency in the milling cartel. But an SACC commissioner has said that cartel members that have not cooperated with the investigation will face fines higher than those imposed on Tiger Brands for its participation in the bread cartel – fines up to 10 per cent of their annual turnover.

[417] *South Africa Issues Record Cartel Fine*, GLOBAL COMPETITION REVIEW (Apr. 10, 2008).

[418] Jocelyn Allison, *Sasol to Pay $7M More over Fertilizer Cartel*, COMPETITION LAW 360 (May 19, 2009).

[419] Bundeskartellamt, Press Release, *Bundeskartellamt Imposes 130 Million Euro Fine Against Industrial Insurers* (Mar. 23, 2005); Bundeskartellamt, Press Release, *Bundeskartellamt Imposes Multi-Million Fines Against Public Industrial Insurers* (Sept. 15, 2005).

[420] Competition lawyers have noted that the gas companies were "lucky," as the fines were calculated under Germany's old guidelines; the new guidelines allow the Bundeskartellamt to impose significantly higher fines. *Germany Levels Fines for Propane Cartel*, GLOBAL COMPETITION REVIEW (Dec. 20, 2007).

[421] *Germany Issues Record Fine*, GLOBAL COMPETITION REVIEW (Dec. 3, 2007).

The Bundaskartellamt was particularly active in 2008, beginning with a €62 million fine in January levied against the two largest European manufacturers of decorative paper for price-fixing;[422] a €37 million fine in February upon four companies for price-fixing and exchanging information about retailer rebates on shower gel, washing detergent, and toothpaste;[423] a €10.3 million fine in May against pharmaceutical company Bayer Vital for illegally offering discounts to pharmacies upon the condition that they follow Bayer's price recommendations on over-the counter drugs, including aspirin;[424] and a €10 million in July 2008 against makers of luxury cosmetics and perfume brands for "systematically exchanging information" on sales figures, pricing, advertising campaigns, and product launches. While exchanging competition-sensitive information is a less serious offense than outright price-fixing, commentators have noted that the Bundeskartellamt is "trying to send a signal" that it intends to apply much stricter rules to market information systems. Note that the fines were based upon Germany's Competition Act as of 2005, which required the Bundeskartellamt to prove that companies gained additional profits as a result of information sharing, but subsequent amendments to the Competition Act have alleviated this difficult burden of proof.[425] In April 2009, the Bundaskartellamt announced fines of €41 million on participants in two participants in a fluid gas cartel.[426]

France. In April 2006 the Conseil de la Concurrence (France's Competition Council) fined nine companies a total of €5 million for fixing prices on wooden doors. It granted leniency for the first time to one of the defendants, reducing its fine to zero.[427] In November 2005, in a case that may be of particular interest to counsel who travel, the French Competition Council fined the leading luxury hotels in Paris a total of €709,000 for collusion.[428]

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[422] *Germany Fast-Tracks Paper Cartel Fine*, GLOBAL COMPETITION REVIEW (Feb. 6, 2008).

[423] *Germany Fines Household Brands Cartel*, GLOBAL COMPETITION REVIEW (Feb. 22, 2008).

[424] *Bayer Vital Fined for RPM*, GLOBAL COMPETITION REVIEW (May 28, 2008).

[425] *Germany Fines Cosmetics Brands*, GLOBAL COMPETITION REVIEW (July 11, 2008).

[426] *Germany Fines Gas Companies*, GLOBAL COMPETITION REVIEW (Apr. 16, 2009).

[427] Conseil de la Concurrence, Press Release, *The Conseil De La Concurrence Implements The Leniency Procedure For The First Time And Fines Two National Cartels* (Apr. 11, 2006).

[428] Conseil de la Concurrence, Press Release, *Le Conseil De La Concurrence Sanctionne Le Bristol, Le Crillon, Le George V, Le Meurice, Le Plaza Athenee Et Le Ritz, Pour Avoir Echange Des Informations Commerciales Confidentielles* (Nov. 28, 2005).

In March 2007, France's Competition Council fined two cement manufacturers a combined €25 million for limiting the supply of cement to the island of Corsica.[429] Two months later, the Council fined 12 construction companies a total of €47 million for sharing markets in a school-building program.[430] The penalty, the maximum amount authorized under France's competition legislation (five percent of the companies' turnover), followed a separate criminal proceeding in which the companies were accused of bid-rigging.[431] The Competition Council fined 12 removal companies more than €2 million in December 2007 for price-fixing and bid-rigging. The case was the second in which the Council has granted full immunity to a leniency applicant in a cartel enforcement action.[432]

The Competition Council fined six exotic plywood manufacturers a total of €8 million in May 2008 for price-fixing,[433] and in June 2008, the Council fined four industrial cleaning companies a total of €2.7 million for bid-rigging.[434] In December 2008, the Council imposed a €41.1 million fine on four oil companies for operating an air fuel cartel.[435] Later that same month, the Council levied its largest ever fines on companies involved in a steel-trading cartel, €575.4 million, including its largest ever fine on an individual company, €288 million. Notably, the French leniency applicant saw its fine reduced to €82.5 million due to its cooperation with the Council.[436]

Italy. In June 2006, the Italian Competition Authority fined six oil companies a total of €315.4 million for allocating the market for the supply of jet fuel to airports. The largest single fine, against ENI, was €117 million.[437] In April 2006, the Italian Competition Authority fined

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[429] *French Authority Fines Cement Cartel*, GLOBAL COMPETITION REVIEW (March 13, 2007). The Council also levied fines of much lesser amounts against the companies' distributors and wholesalers.

[430] *France Fines School-Building Cartel*, GLOBAL COMPETITION REVIEW (May 14, 2007).

[431] *Id.*

[432] *France Penalises Haulage Cartel*, GLOBAL COMPETITION REVIEW (Dec. 19, 2007).

[433] *France Fines Plywood Manufacturers*, GLOBAL COMPETITION REVIEW (May 23, 2008).

[434] *France Fines Cleaning Companies*, GLOBAL COMPETITION REVIEW (June 12, 2008).

[435] *France Hits Oil Cartel*, GLOBAL COMPETITION REVIEW (Dec. 5, 2008).

[436] *France Hits Steel Companies with Record Fines*, GLOBAL COMPETITION REVIEW (Dec. 16, 2009).

[437] Italian Competition Authority, Press Release, *Antitrust Fines Six Oil Companies €315.4M Over Arrangement In Airport Fuel Supplies* (Jun. 20, 2006).

nine companies a total of €3.7 million for price-fixing and market allocation in the supply of disinfectant and antiseptic products to the public health system.[438] In May 2007, the Authority fined eight Italian chipboard manufacturers that together controlled approximately 80 per cent of the Italian chipboard market, a total of €31 million for cartel activity.[439] Also in 2007 the Authority fined four medical suppliers a total of €4 million for bid-rigging in the colostomy bag market.[440] After a few years of relative quiet, in February 2009, the Authority imposed €12.5 million in fines on several pasta companies, including Barilla, Buitoni, and De Cecco, for allegedly conspiring to drive up the prices for semolina dry pasta.[441]

The Netherlands. As part of a "fast-track" procedure in which representatives of entire sectors negotiate dispositions on behalf of all represented companies in return for a discount on fines, the Netherlands Competition Authority (NCA) has now imposed approximately €225 million in fines against over 1200 companies in various segments of the construction industry. In July 2006, as part of this effort, it fined nine manufacturers of prefabricated concrete piles a total of more than €3 million, and three manufacturers of concrete floor elements a total of more than €2 million.[442] The NCA has drafted new leniency guidelines that would permit fines of up to €450,000 against individuals.

Hungary. With the assistance of a leniency applicant, Switzerland-based ABB, in late December 2005 the Competition Council fined four companies a total of HUF702 million for their participation in a cartel to divide the market for gas-insulated high tension electronic

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[438] Italian Competition Authority, Press Release, *Fines Totaling €3.7M For Anti-Competitive Conduct Levied By The Antitrust Authority On Nine Suppliers Of Antiseptics And Disinfectants To The Public Health System* (May 29, 2006).

[439] *Italy Grants Leniency Retrospectively*, GLOBAL COMPETITION REVIEW (May 31, 2007). The company that blew the whistle on the cartel back in 2003 escaped without a fine even though Italy had no leniency policy in place at the time the company reported.

[440] *Italy Penalises Medical Suppliers*, GLOBAL COMPETITION REVIEW (Aug. 9, 2007).

[441] Liz McKenzie, *Italian Antitrust Bureau Fines Pasta Cos. $15.9M*, COMPETITION LAW 360 (Feb. 26, 2009).

[442] Netherlands Competition Authority, Press Release, *NMA Fines 12 Manufacturers of Prefab Concrete Products For Cartel Offences* (July 12, 2006).

switchgears.[443] The defendants were part of a larger cartel consisting of nine European and five Japanese companies that divided the world market for gas-insulated switchgears in 1988.[444]

In January 2007, Hungary's Competition Authority fined six car insurance companies a total of €26.8 million for conspiring to charge excessive fees for car repairs. The cartel was uncovered in 2005 during office raids. The ring leader company was fined €21 million, with the other companies involved being fined €4.1 million, €1.4 million and other lesser amounts.[445] In November 2007, The Authority fined two delivery companies close to US $3 million each for their part in a news paper distribution cartel, after it found that the companies had agreed not to enter each other's markets since 1998.[446] In June 2008, the Competition Authority launched a widespread investigation of 11 milling companies suspected of price-fixing and colluding on public procurement tenders. In connection with that investigation, the Competition Authority raided the offices of at least eight of the suspect companies.[447]

New Zealand. Seven companies and four individuals have been fined a total of $7.5 million NZ for price-fixing and market allocation in the wood preservative chemicals industry between 1998 and 2002.[448] In April 2006, the High Court fined a New Zealand company and its Australian parent, Koppers Arch Wood Protection (NZ) Limited and Koppers Arch Investments Pty Limited, a record $3.6 million NZ. The fine was more than double the previous highest fine in New Zealand. In June 2005, Koppers Arch NZ and its former General Manager pled guilty to

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[443] Hungarian Competition Council, Press Release, *GVH Imposed A HUF 702 Million Fine As A Total On Undertakings Members Of A Market Sharing Cartel* (Dec. 23, 2005); *see also Hungarian Competition Authorities Slap HUF 702 Mln Fine On Electric Equipment Cartel*, Interfax Hungary Weekly Business Report (Dec. 23, 2005).

[444] *See id*. In May 2004, the European Commission and several member states conducted dawn raids on the premises of a number of manufacturers of gas-insulated switchgears. *See* Anita Greil and Dan Bilefsky, *EU Raids Offices Of Switch Makers In Probe Prompted By ABB Tip*, WALL STREET JOURNAL EUROPE (May 14, 2004). Interestingly, the OECD reports that Turkish authorities suspected the existence of cartel activities in the same industry in Turkey, but found its investigation hampered by the lack of a means for the EC to share information about its investigation. *See* OECD, *Hard Core Cartels: Third Report On The Implementation Of The 1998 Recommendation* (Dec. 16, 2005), at 32.

[445] *Hungary Fines Insurance Cartel*, GLOBAL COMPETITION REVIEW (Jan. 10, 2007).

[446] *Fines Postal Cartel*, GLOBAL COMPETITION REVIEW (Nov. 23, 2007).

[447] *Hungary Pursues Milling Cartel*, GLOBAL COMPETITION REVIEW (June 11, 2008).

[448] *More Fines in New Zealand's Largest Cartel*, GLOBAL COMPETITION REVIEW (Feb. 13, 2008).

obstructing the Commerce Commission's investigation.[449] In its most recent prosecutorial action, in December 2008, New Zealand's competition regulator turned its attention to 13 international airlines participating in a cartel involving fuel surcharges in the air cargo market.[450] The airlines had already been subject to proceedings brought by the U.S. DOJ, EC, and ACCC.

Israel. In September 2007, the former CEO of SuperGas, an Israeli liquefied petroleum gas distributor, pled guilty to cartel activity and agreed to spend 100 days in jail and pay a 150,000 shekel ($36,000 USD) fine. The company agreed to a 3.8 million shekel ($920,000 USD) fine. SuperGas is the latest liquefied petroleum gas company to offer a plea bargain to Israel's Antitrust Authority. But the CEO is the first of the executives to accept a prison sentence for his role in the cartel.[451] More recently, in November 2008, the former CEO of an Israeli paint manufacturer was convicted of cartel offenses after having withdrawn from a plea agreement under which he would have been sentenced to three months community service and fined 60,000 shekels ($15,500 USD).[452] And in January 2009, Israel's Antitrust Authority announced that it is seeking 290 million shekels ($74.8 million USD) in fines from the country's five largest banks for alleged cartel behavior.[453]

Brazil. In November 2007, Brazil's competition authority, CADE, entered into its first agreements with cartelists since CADE's implementation of a settlement program. CADE fined two companies – a cement and concrete manufacturer and Latin America's largest beef producer (JBS) – a combined US $31.7 million for their roles in the two cartels.[454] Two JBS officials also received fines.

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[449] Commerce Commission, Press Release, *Koppers Arch To Pay A Record $3.6 Million In Cartel Penalties* (Apr. 7, 2006). Despite Koppers Arch NZ's guilty plea for obstruction of justice, the Commission still proposed a fine that it acknowledged was half of the penalty Koppers Arch would have received had it lost at trial, to reflect its guilty plea and cooperation with the Commission.

[450] Christine Caulfield, *NZ Competition Agency Targets Air Cargo Cartel*, COMPETITION LAW 360 (Dec. 15, 2008).

[451] *Israeli Authority Secures Jail Time*, GLOBAL COMPETITION REVIEW (Sept. 6, 2007).

[452] *Israel Convicts Former CEO*, GLOBAL COMPETITION REVIEW (Nov. 6, 2008).

[453] *Israeli Banks Face Record Fine*, GLOBAL COMPETITION REVIEW (Jan. 14, 2009).

[454] *New Brazilian Programme Leads to Cartel Fines*, GLOBAL COMPETITION REVIEW (Nov. 29, 2007). Lafarge, the cement and concrete manufacturer, has been convicted of participating in cartel activity in several other jurisdictions, and shared in part of a €660 million fine issued in Europe in 2003. The beef investigation, in which JBS allegedly colluded with suppliers to fix prices, has now closed.

In September 2007, the Supreme Brazilian Tribunal of the Federal District upheld a US $1 million fine imposed on a company involved in cartel activity in the construction industry. The company, Itapisserra, is one of 17 defendants found to have fixed the prices of raw materials sold to civil construction firms. The conspirators, prosecuted by CADE, were each fined between 15 and 20 per cent of their 2002 revenues, for a total of US $28.2 million.[455] The Tribunal subsequently upheld the fines levied against two other defendant companies, Embu Engenharia e Comércio and São Matheus Lageado.[456]

CADE has recently stepped up its enforcement of cartel regulations. Ana Paula Martinez, Director of the CADE, has stated that cartel prosecution is now a "top priority" in Brazil, and that the organization is "increasing cooperation with the police and public prosecutors in order to ensure that managers and directors of companies who engage in illegal cartels will face full criminal liability."[457] A Special Anti-Cartel Unit has been established within the Sao Paulo State Prosecutor's office, and CADE now works with existing law enforcement networks that ordinarily target organized crime and money laundering to identify and expand cartel investigations.[458] Brazil has launched a National Strategy for Fighting Cartels, and on October 8, 2009, both federal and state criminal authorities signed the Brasilia Declaration committing that the fight against cartels would be their top priority.[459] The Brazilian government has also engaged in an effort to raise public awareness of cartels, including public advertising campaigns and the designation of a national Anti-Cartel Day.[460]

These efforts have yielded concrete results. The number of cartel-related search and seizure warrants served has increased, as investigations have been conducted across Brazil.[461] Over 100 executives currently face criminal investigations, and 34 executives have been criminally sentenced.[462] On July 2, 2008, CADE launched operation "Invisible Hand" and

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[455] *Federal Court Upholds Flintstones Fine*, GLOBAL COMPETITION REVIEW (Sept. 25, 2007).

[456] *Brazil Upholds Fine in Flinstone Cartel*, GLOBAL COMPETITION REVIEW (June 16, 2008).

[457] *SDE Arrests 23 Executives*, GLOBAL COMPETITION REVIEW (July 4, 2008).

[458] Ana Paula Martinez, *Developing Effective Relations With Public Prosecutors And Other Partners: The Brazilian Experience*, Presentation delivered at the ICN Cartel Workshop 2009, Cairo, Egypt (October 2009) (hereinafter "Martinez Speech"); *Brazil Refocuses on Cartel Enforcement*, GLOBAL COMPETITION REVIEW (Sept. 19, 2008).

[459] *Id*.

[460] Martinez Speech, *supra*, note 444.

[461] *Id*.

[462] *Id*.

conducted a dawn raid of 42 fuel market companies. The raid was the CADE's largest yet, resulting in the arrest of 23 company executives. And, as previously discussed, in October 2009, CADE extracted a settlement of 100 million Reais ($57 million USD) from two Brazilian subsidiaries of Whirlpool for their role in a refrigerator compressor cartel.[463]

Spain. Spain's National Competition Commission (CNC) has been particularly active in 2008, launching widespread inspections to demonstrate that "cartel investigations are now a top priority at the CNC." Since May, the CNC has initiated probes of trade unions, fish merchants, movie rental businesses, cosmetics companies, and iron industry affiliates.[464] In November 2009, the CNC fined six European insurance companies €120 million, its largest-ever fine, for their role in a cartel to fix construction insurance prices during the housing boom of the earlier part of the decade.[465]

Belgium. In April 2008, Belgium's Competition Council imposed its largest fines ever against three companies for price-fixing and market allocation for BBP, a chemical used in the manufacture of PVC Products. This marks the first time that the Council has imposed fines on a "hardcore" horizontal cartel since the enactment of Belgium's Competition Act in 1991. The investigation was launched after Bayer came forward under Belgium's leniency program.[466]

The Competition Council has also secured fines against two trade associations as of July 2008, fining the Flemish Association of Bakeries €29,000 in January for setting up a bread price index that encouraged members to raise prices,[467] and fining the Federation of Professional Driving Schools €6,990 for imposing bylaws that prevented members from freely determining their prices. The fines, though relatively small, are intended to send the message that trade associations cannot limit the freedom of their members in setting prices independently, and to demonstrate that "the Belgian authority is putting itself on the map, step-by-step."[468]

Pakistan. Pakistan's Competition Commission issued its first ever cartel decision in May 2008, fining seven banks and the Pakistan Bank Association more than PKR 205 million ($2.7

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[463] *Fridge Cartelist Pays 'Landmark' Fine in Brazil*, GLOBAL COMPETITION REVIEW (Oct. 9, 2009).

[464] *Spain Raids Iron Companies*, GLOBAL COMPETITION REVIEW (July 10, 2008).

[465] Allison Grande, *Spain Hits 6 Insurers with €120M Price-Fixing Fine*, COMPETITION LAW 360 (Nov. 12, 2009).

[466] *Belgium Issues Largest Ever Fines*, GLOBAL COMPETITION REVIEW (Apr. 7, 2008).

[467] *Belgium Issues First Fine Under New Law*, GLOBAL COMPETITION REVIEW (Jan. 29, 2008).

[468] *Belgium Penalises Driving Schools Association*, GLOBAL COMPETITION REVIEW (July 9, 2008).

million USD) for fixing interest rates on enhanced savings accounts – fines significantly lower than they could have been, according to the Commission Member who imposed them, because of the historic non-enforcement of antitrust law in Pakistan and the consequent novelty of the fines.[469] In 2009, the Competition Commission was not so forgiving: in September 2009, it imposed a 6.3 billion rupee fine ($76.6 million USD) on 20 cement makers in an alleged cement cartel.[470] In doing so, the Competition Commission clearly set a precedent for future prosecutions.

Romania. Romania's Competition Council fined four pharmaceutical companies ROL 83.7 million ($34.9 million USD) in March 2008 for partitioning the publicly funded section of the insulin market in 2003. The fines represent approximately 3.6 percent of each company's annual turnover, and are the first ever imposed upon pharmaceutical companies in Romania for anti-competitive agreements.[471]

Slovakia. Slovakia's Anti-Monopoly Office fined 16 companies from seven different countries a total of SKK 350 million ($17.1 million USD) in January 2008 for an illegal agreement between suppliers of gas-insulated switchgear. The case follows the country's very first leniency application, filed by ABB, a Swiss producer of the switchgear.[472]

Bulgaria. In January 2008, Bulgaria's Commission for Protection of Competition (CPC) fined fourteen cooking oil firms approximately €1 million for their involvement in price-fixing, following a series of dawn raids conducted by the office in 2007. The country's cooking oil-manufacturing union was also fined for allegedly holding the meetings at which the price-fixing discussions took place.[473]

Mexico. In June 2009, Mexico's Federal Competition Commission fined two railways 419 million pesos ($32 million USD) for their role in fixing prices. The fine was the maximum allowed by law, and was intended to signal the Commission's willingness to enforce the competition laws to their fullest extent.[474]

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[469] *Pakistan Busts Banking Cartel*, GLOBAL COMPETITION REVIEW (May 22, 2008).

[470] Melissa Lipman, *Pakistan Fines Cement Cos. $77M For Alleged Cartel*, COMPETITION LAW 360 (Sept. 2, 2009).

[471] *Romania Fines Drugs Companies,* GLOBAL COMPETITION REVIEW (Mar. 6, 2008).

[472] *Slovakia Fines GIS Cartel in First Leniency Case*, GLOBAL COMPETITION REVIEW (Jan. 21, 2008).

[473] *Bulgaria Fines Cooking Oil Cartel*, GLOBAL COMPETITION REVIEW (Jan. 21, 2008).

[474] Jesse Greenspan, *Mexican Railways Hit With $32M Price-Fixing Fine*, COMPETITION LAW 360 (June 25, 2009).

Singapore. Singapore's Competition Commission issued its first cartel decision in January 2008, fining six pest control companies a total of more than S$262,000 ($184,000 USD) for bid-rigging.[475] The fine may be small in relative terms, but the enforcement action may signal that the Commission is now ready and able to purse cartel enforcement in Singapore.[476]

Austria. In November 2008, the Austrian Supreme Court upheld fines of €35 million imposed by the country's antitrust authority on a Swiss elevator manufacturer involved in an international elevator cartel.[477] The fines were imposed the previous year as part of a €88 million fine against all participating manufacturers, which was in addition to the fines assessed by the EC.[478]

Russia. In December 2008, Russia's Federal Antimonopoly Service fined two oil companies €38.7 million, the largest penalty it had ever imposed, for fixing the price of diesel, petrol, and aviation fuel during the summer of 2007.[479] Because the Federal Antimonopoly Service imposed the minimum possible fine, experts predicted that subsequent violations would draw stiffer penalties.[480]

VI. The Rise Of Civil Litigation In The New International Enforcement Environment

The growth of international enforcement efforts and leniency programs throughout the world has also resulted in the significant growth and expansion in civil litigation stemming from anti-cartel enforcement. As a result, as noted above,[481] evaluating potential civil litigation exposure is a necessary step in assessing whether or not to apply for leniency. In addition, remaining mindful of the potential civil litigation consequences of actions taken as one engages with or responds to the enforcement agencies is also critical.[482]

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[475] *Singapore Announces First Cartel Fines*, GLOBAL COMPETITION REVIEW (Jan. 16, 2008).

[476] *See id*.

[477] Melissa Lipman, *Austrian Court Upholds €35M In Elevator Cartel Fines*, COMPETITION LAW 360 (Nov. 7, 2008).

[478] *See id.*

[479] *Russia Issues Largest Ever Fine*, GLOBAL COMPETITION REVIEW (Dec. 29, 2008).

[480] *See id.*

[481] *See supra* Section II.E.

[482] *See supra* Section III ("Rule No. 4: Never Forget The Civil Litigation").

Presently, the greatest civil litigation exposure for international cartel participants arises in the United States. However, there are growing indications that international cartel participants may soon face civil litigation exposure in Europe as well. This Section provides a detailed overview of the U.S. litigation landscape (for readers unfamiliar with how civil remedies for cartel conduct are sought in the U.S.) and the enforcement policy issues it presents. It also provides an overview of new developments in both the U.S. and Europe.

A. Growth In Cartel-Related Civil Litigation In The U.S.

As one would expect, with the DOJ's amnesty policy leading to an increase in the number of criminal cartel cases and attendant guilty pleas, there has been a similar rise in cartel-related civil litigation. In the U.S., the civil litigation picture can be complex, unpredictable, and largely unbounded with respect to scope of coverage and damages. This results in part from the fact that U.S. civil litigation related to cartels comes in a variety of forms.

1. Direct Purchaser Actions

First, a pleading party – and, in due course if not immediately, an amnesty applicant – is likely to face direct purchaser class actions in U.S. federal court alleging violations of §1 of the Sherman Act. If liability is found – and it invariably is found if the defendant has pled guilty and therefore is collaterally estopped from denying the violation – these lawsuits impose joint and several liability on each defendant, regardless of whether its role in the conspiracy was limited. In addition, there is no right of contribution.

In recent years, the overall scope of such lawsuits has increased, often well beyond the bounds of the underlying criminal action. They may target companies or individuals who were not subject to criminal proceedings and allege conspiracies that are broader in product coverage and time period than those to which the defendants pled in the criminal proceedings.

Settlement demands have also increased. Whereas in the 1970s and 1980s publicly reported settlements generally reflected a two to four percent overcharge for a four-year or shorter time period (consistent with the applicable four-year statute of limitations),[483] today

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[483] *See Closing Remarks of Michael L. Denger*, ABA Remedies Forum n.6 (2003), citing *In re Plastic Tablewares Antitrust Litig.*, 1995 WL 678663 (E.D. Pa. 1995) (approving settlement of 3.5% of sales over a four and one half year conspiracy period); *Fisher Bros. v. Mueller Brass*, 630 F. Supp. 493, 499 (E.D. Pa. 1985); *Fisher Bros. v. Cambridge-Lee Industries*, 630 F. Supp. 482, 489 (E.D. Pa. 1985); *Fisher Bros. v. Phelps Dodge Industries*, 604 F. Supp. 446, 451 (E.D. Pa. 1985) (approving four settlements in a class action alleging an eight-year conspiracy among copper pipe manufacturers to fix prices which, as a percentage of sales during the four-year period prior to the tolling of the statute of limitations, ranged from 2.43% to 0.21%); *In re Shopping Carts Antitrust Litig.*, 1984-1 Trade Cas. (CCH) ¶ 65,823 (S.D.N.Y. 1983) (defendants settled for 6% and 3% of total sales during four-year period); *In Re Armored Car Antitrust Litig.*, 472 F. Supp. 1357, 1368 (N.D. Ga. 1979) (3.88% of sales

[Footnote continued on next page]

double-digit percentage overcharge settlements occur (before other costs like attorneys fees) and plaintiffs may reach back beyond four years (based on claims that the statute of limitations was tolled because the defendants concealed their conspiracy).

2. Opt-Out Litigation

Defendants are also likely to have to litigate with opt-outs from any direct purchaser class action settlement. Although this varies from case to case, opt-outs can account for 50 percent or more of class purchases, and they commonly file their own lawsuits in federal court.

Settling with opt-out direct purchasers can be very difficult. It is not uncommon for direct purchaser plaintiffs – particularly sophisticated claimants – to hold out in an effort to obtain higher percentage settlements. They typically demand a most favored nations clause, which then may bind the defendant in settling with other opt-out direct purchasers or prolong the litigation process (until the most favored nations clause expires).

3. Indirect Purchaser Actions

Defendants in cartel cases also routinely face indirect purchaser and other actions in U.S. state courts. Indirect purchaser actions are now routinely filed in multiple states in which *Illinois Brick*, the U.S. Supreme Court decision preventing indirect purchasers from suing under federal antitrust law,[484] has been repealed by legislative action permitting indirect purchaser lawsuits in state courts.

An additional complexity in indirect purchaser cases relates to the scope of the causes of action and available defenses. Under state law, these are often unsettled areas of law and vary from state to state. The different proceedings can lead to application of different discovery rules and procedures in each state. Of course, defendants must also hire separate counsel in each state and then coordinate those counsel going forward. The passage of the Class Action Fairness Act will result in many of these actions being pulled into federal court and consolidated for pre-trial

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during two-year period), *aff'd in relevant part*, 645 F.2d 488 (5th Cir. 1981); *In Re Anthracite Coal Antitrust Litig.*, 79 F.R.D. at 711 (3.08% of defendants' total sales over three-year period); *In Re Fine Paper Antitrust Litig.*, 1987 WL 10110, at *6 & n.1 (E.D. Pa. 1987) (settlement representing "less than one-tenth of one percent of annual fine paper sales" of the settling defendants), *aff'd without opinion.*, 841 F.2d 1118 (3d Cir. 1988); M. Cohen & D. Scheffman, *The Antitrust Sentencing Guidelines: Is The Punishment Worth The Costs?,* 27 Am. Crim. L. Rev. 331, 345 (1989) (study of seven class action cases settled between 1971 and 1976 involving the bread industry demonstrated that the average settlement was 2.87% of defendants' annual sales).

484 *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977). In a later decision, *California v. ARC America Corp.*, 490 U.S. 93 (1989), the Supreme Court clarified that states could provide for indirect purchaser actions under state law.

purposes – a notable positive change – but the Act's ultimate "net" impact on the costs and outcomes in indirect purchaser actions remains to be seen, as noted more fully in Section VI.E.3 below.[485]

A final complicating consideration is the fact that state attorneys general may also file separate *parens patriae* actions to recover on behalf of their citizens for indirect purchaser damages in parallel with private counsel.

B. Policy Issues Raised By Criminal And Civil Proceedings In Cartel Cases

Although few would dispute the importance and value of enhanced criminal enforcement against cartels wrought by the DOJ amnesty program and the right of injured parties to sue for redress under applicable laws, some have questioned whether the unbounded damages exposure in the U.S. is appropriate and whether there needs to be an affirmative coordination or melding of the criminal and civil enforcement systems to achieve a rational, efficient whole.[486]

Among the concerns raised is the fact that sentencing in criminal cases is wholly divorced from the assessment and imposition of damage awards in civil litigation. Criminal fines are based on a variety of assumptions and adjustments that start with a baseline 20 percent presumed estimated "loss" suffered by victims,[487] and civil litigation settlements – addressing the same

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[485] As noted there, a useful overview of the Class Action Fairness Act and its likely impact can be found in ANTITRUST magazine's 2005 symposium on the Act. Subsequently, in April 2007, the Antitrust Modernization Commission made several recommendations with respect to direct and indirect purchaser litigation in relation to CAFA. *See* Report and Recommendations of the Antitrust Modernization Commission (April 2007), at 17, *available at* http://www.amc.gov (recommending that Congress enact legislation allowing both direct and indirect purchasers to sue for actual damages under federal law, allowing the removal of indirect purchaser actions to the full extent permitted under Article III of the Constitution, allowing for the consolidation of all actions in a single federal forum for both pre-trial and trial purposes, and allowing for certification of classes of direct purchasers without regard to whether the alleged injury passed on to customers).

[486] *See, e.g.,* Michael L. Denger & D. Jarrett Arp, *Criminal And Civil Cartel Victim Compensation: Does Our Multifaceted Enforcement System Promote Sound Competition Policy?,* ANTITRUST 143 (Summer 2001); *Report Of ABA Section Of Antitrust Law Task Force On The Federal Antitrust Agencies – 2001* (Jan. 2001) (hereinafter "ABA Antitrust Report on Federal Antitrust Agencies").

[487] *See* U.S.S.G. § 2R1.1(d)(1). The 20 percent figure is simply an assumption made to avoid the time and cost of calculating the actual overcharge. *See id.,* comment n.3 ("The purpose for specifying a percent of volume of commence is to avoid the time and expense that would be required for the court to determine the actual gain or loss."). In April 2007, the Antitrust Modernization Commission recommended that Congress encourage the Sentencing

[Footnote continued on next page]

losses by victims – are now routinely based upon double-digit assumed overcharges as well. It is also important to note that the civil exposure often arises in connection with multiple, uncoordinated classes of civil litigation that typically proceed simultaneously in different courts throughout the country (as described above). Under the Class Action Fairness Act, most of those cases are likely to proceed before a single federal judge, but the criminal litigation process remains divorced from addressing civil claims.

As a result, the aggregate civil damages exposure faced by a defendant is subject to no limiting principle and arises from diverse claims under a variety of different laws. The aggregate fines and damages paid may have little relationship to actual damages and can amount to a number in excess of trebled actual damages. Regardless of what one thinks about whether cartels are over-deterred or under-deterred, the disconnect between the criminal and civil processes is a topic particularly worthy of attention.[488]

Although recognizing the value and importance of further study with respect to the specifics of a reform proposal, the report of the 2001 American Bar Association Antitrust Section Task Force on the Federal Antitrust Agencies recommended that a solution may be found through legislation (or federal/state agreement) to require consolidation of all federal and state court actions related to a cartel – the criminal proceeding, direct and indirect purchaser class actions, and state attorney general claims – in the federal district court in which the original criminal (or civil) action was filed. The criminal trial, if any, would proceed first, followed by any necessary civil trial to assess whether the defendants violated the antitrust laws (subject to the collateral estoppel effect of the defendants' pleas or any guilty verdicts). Once criminal and civil liability are determined, the court would assess aggregate damages from the conspiracy at

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Commission to reevaluate and explain the rationale for using 20 percent of the volume of commerce affected as a proxy for actual harm, and it has recommended that the Sentencing Commission amend the Sentencing Guidelines to make explicit that the 20 percent harm proxy (or any revised proxy) used to calculate the gain or loss resulting from a violation may be rebutted by proof by a preponderance of the evidence that the actual amount of overcharge was higher or lower, where the difference would materially change the base fine. *See* Report and Recommendations of the Antitrust Modernization Commission (Apr. 2007), at 19.

[488] As the 2001 American Bar Association Antitrust Section Task Force on the Federal Antitrust Agencies noted, multiple enforcers could issue a variety of civil and criminal penalties, without any coordination among them. The Task Force noted that "[a]s a result, our systems generates large administrative costs, large legal fees, and haphazard results in terms of victim compensation," and called for reform for "a problem [that] deserves serious attention." *ABA Antitrust Report On Federal Antitrust Agencies,* at 4-5. *See also id.* at 21-26. For a discussion of the policy problems raised by state indirect purchaser cases, see *Report Of The Indirect Purchaser Task Force*, 63 ANTITRUST L.J. 993 (1995).

the direct purchaser level, and then, in a final step, allocate the damages amount between and among direct and indirect purchasers as well as other claimants.[489]

While this matter is generally framed as a broader policy issue, it is not without specific real-world implications for the continued success of the DOJ's amnesty program. As anyone who has represented companies considering self-reporting under the DOJ's Corporate Amnesty Policy knows, the relationship between applying for amnesty (or otherwise seeking leniency) and the criminal proceedings that follow, on the one hand, and the inevitable follow-on civil litigation and open-ended damages exposure, on the other, is a matter of intense focus for prospective amnesty applicants. A responsible company that identifies and halts collusive activities within its ranks must decide whether then to apply for amnesty. Should it report the violation to the government or should it stay quiet, ending the collusion but waiting to see if the statute of limitations runs before the activity is discovered? For management of a company that is assessing whether to report an offense while also being mindful of its obligations to the company and its owners, the disconnect between criminal and civil enforcement policies and the unpredictable damage exposure arising from today's civil litigation situation are deterrents to cooperation with antitrust enforcers.

Epson's recent guilty plea in the TFT-LCD investigation exemplifies the difficulties faced by a cooperating defendant in navigating the relationship between criminal and civil proceedings. In August 2009, Epson Imaging Devices Corporation (a Japanese corporation) agreed to plead guilty to a Section 1 violation, with a reduced penalty of $26 million in exchange for Epson's cooperation with the investigation TFT-LCD investigation.[490] Critically, the Antitrust Division did not seek restitution as a separate penalty because an Epson entity was already implicated in the ongoing LCD-TFT class action.[491] The Court, however, was unwilling to accept the Antitrust Division's foregoing of a restitution penalty without assurances that Epson Imaging Devices Corp. – the company actually entering the guilty plea – was (or would be made) an actual named defendant in the civil class action.[492] Only after defense counsel actually brought plaintiffs' counsel to court to pledge that plaintiffs did intend to add Epson Imaging Devices Corporation as a defendant to the class action did the court approve the plea

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[489] *See id.* at 23-24.

[490] Plea Agreement, *United States . Epson Imaging Devices Corp.*, No. CR 09-0854 SI (N.D. Cal. Oct. 23, 2009) (hereinafter "Epson Plea Agreement").

[491] The plea agreement stated only that the Government was foregoing restitution because the "defendant" was "alleged to be a co-conspirator" in the civil class action, without explaining either which party the term "defendant" described, or which party was an actual named defendant in the civil class action. Epson Plea Agreement at ¶ 12.

[492] *See* Transcript of Proceedings at 25:16-19, *United States v. Epson Imaging Devices Corp.*, No. CR 09-0854 SI (N.D. Cal. Oct. 16, 2009).

agreement including the Antitrust Division's waiver of restitution.[493]

While the Epson plea is a single example, it illustrates the dilemma facing a cartel member considering cooperation: cooperate, and you may find yourself forced to be a defendant in a whole new lawsuit, or refuse to cooperate, and forego a reduced penalty. As described herein, both the American Bar Association and the Antitrust Modernization Commission have recommended changes to ease some of this tension, but not all of these recommendations have been implemented. Other changes, described below, have made some difference, but have not fully eliminated the dilemma facing a potential leniency applicant.

The changes in civil damages exposure for amnesty applicants under the new Antitrust Criminal Penalty Enhancement and Reform Act will help assuage the concerns of amnesty applicants to some degree, and therefore increase incentives to report. In addition, the Class Action Fairness Act ("CAFA") will operate to consolidate state and federal class actions, thereby reducing some costs and over time is likely to make the litigation process more predictable.

Additional reform is still needed, however. Under the CAFA, for example, federal court judges will be forced to evaluate class certification motions in both direct and indirect purchaser actions, absent the type of comprehensive substantive reconciliation as recommended by the Antitrust Modernization Commission in April 2007.[494] As noted elsewhere,[495] until such reforms, if any, are made, the current rubric places federal judges in an awkward position, as they attempt to evaluate whether to allow indirect purchaser class actions to go forward in a court that normally would have to reject the indirect purchaser claims as barred by the Supreme Court's decision in *Illinois Brick*. For this reason, the recommendations of the Antitrust Modernization Commission merit serious consideration. Achieving a uniform national standard applicable to direct and indirect purchaser damages claims would, in combination with CAFA and the de-trebling of damages owed by successful amnesty applicants, be a major step forward and likely significantly reduce the present civil litigation-related disincentives for self-reporting cartel conduct.

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[493] *Id*. at 32:3-35:25.

[494] *See supra* note 305.

[495] *See* Arp, *Unintended Consequences*, at 9-10 (noting, *inter alia,* the fact that CAFA will require federal courts to evaluate class certification in state-law indirect purchaser actions, including issues of overcharge pass-through and allocation of damages, when those same courts are bound by the Supreme Court's opinion in *Illinois Brick*, which questions the feasibility of measuring pass-though and allocating damages among various categories of purchasers).

C. Potential Growth In Cartel-Related Civil Litigation In Europe

Just as the DOJ's amnesty policy has led to an increase in cartel-related civil litigation in the U.S., it appears that cartel-related civil litigation in Europe may increase as a result of recent developments there designed to encourage such litigation as a complement to public enforcement. These developments are discussed below at Section VI.E.4.

D. Procedural Issues Raised By Amnesty And Leniency Applications

While the criminal and civil litigation systems in the U.S. may warrant change that would further encourage the filing of amnesty applications, it bears noting that leniency programs themselves present some notable issues with respect to civil litigation (and vice versa).

1. Discovery Of Written Amnesty Submissions And The "Paperless" Process

Civil plaintiffs pursuing claims against amnesty applicants have shown an interest in obtaining copies of written materials presented to the government by the party that received amnesty. In the U.S. and Canada, experienced practitioners make all "submissions" on behalf of amnesty applicants as oral presentations and typically provide knowledgeable witnesses for oral interviews by government prosecutors.

In the EU, however, as discussed above, written company statements describing and admitting to cartel activity were often required under the 1996 Leniency Notice. That policy required an applicant wishing to obtain the most favorable treatment under the Notice to be the first party to "adduce *decisive* evidence of the cartel's existence,"[496] and the EC required that evidence to be in documentary form.[497] Unless a company had contemporaneous documents decisively evidencing the cartel, usually there was a need to submit a company statement that – in documentary form and in the company's own words – provided the necessary proof of the activities being reported.

This has led to attempts by civil plaintiffs in the U.S. to seek discovery of such submissions to the EC in Brussels, as well as to the Competition Bureau in Canada. The EC and Canada have filed amicus briefs in an effort to prevent discovery of these statements and other communications with foreign enforcement officials. Results of those efforts have been mixed. Although the EC was successful in the *Methionine* litigation in the U.S. District Court for the Northern District of California, precluding discovery of a leniency applicant's submissions to the Commission, it failed to obtain the same result in the *Vitamins* litigation. In *Vitamins*, Judge

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[496] 1996 Leniency Notice ¶ B (emphasis added).

[497] *See* Julian M. Joshua, *Leniency in U.S. and EU Cartel Cases,* ANTITRUST 19, 22 (Summer 2000) (Then-Deputy Head of the EC Cartel Unit noting that "[p]roviding 'decisive evidence' . . . normally requires the production of contemporaneous cartel documentation.").

Hogan of the U.S. District Court for the District of Columbia permitted the discovery of a defendant's submissions to the EC, as well as a variety of correspondence with Canadian enforcers.[498] More recently, the Northern District of California has again ruled against such discovery. In May 2007, pursuant to a comity analysis, it precluded plaintiffs in the *Rubber Chemicals* litigation from discovering communications between a defendant's affiliate and the European Commission made pursuant to the Commission's Leniency program.[499]

The potential discoverability of written materials submitted to authorities in connection with leniency applications raises significant issues with respect to how enforcers proceed in the future. The EC's revised 2006 Leniency Notice allows oral applications, however they will be recorded, transcribed, and confirmed for accuracy by the leniency applicant. These applicant-endorsed transcripts will then be used as evidence by the Commission.[500]

2. Cooperation With The DOJ And Testimony

Another amnesty-related issue that can arise in connection with civil litigation is requests for testimony and certain other discovery served on a civil litigation defendant who is also an amnesty applicant, and thus has pledged to cooperate in the DOJ's investigation and prosecution of the reported offense. Needless to say, Antitrust Division prosecutors generally would prefer

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[498] On the other hand, Judge Hogan declined to permit plaintiffs to discover certain documents related to the plea negotiations in Canada, including the executed plea agreement and drafts of the plea agreement, the agreed statement of facts, the indictment, the prohibition order, and the immunity letter. *See* Memorandum Opinion Re: Bioproducts' Rule 53 Objection, *In Re Vitamins Antitrust Litig.*, No. 99-197 (Dec. 18, 2002).

[499] *See In re: Rubber Chemicals Antitrust Litigation*, 486 F. Supp. 2d 1078, 1080-84 (N.D. Cal. May 9, 2007) (denying plaintiff's motion to compel discovery after balancing multiple comity factors). In *Rubber Chemicals* the defendant submitted a letter from the European Commission opposing discovery of the EC documents. *Id.* at 1080. Gibson, Dunn & Crutcher represents the defendants in this litigation and Mr. Arp argued the discovery motion.

[500] Competition Director General Philip Lowe succinctly outlines the concerns of cartel enforcement agencies with corporate statements submitted during the leniency process being used by civil plaintiffs. See Philip Lowe, *Submission to the Antitrust Modernisation Commission*, (Apr. 4, 2006). Lowe acknowledges that exposure to civil liability provides a powerful disincentive for corporations to participate in the leniency process. Accordingly, the EC supports a paperless process, but continues to require oral corporate statements to be certified and available as evidence in EC proceedings. *See id.* at 9; *2006 Leniency Notice*, ¶ 32. Although the EC has recently proposed a streamlined settlement process for cartel participants in Europe, the current proposal still requires some written documentation. *See supra* Section V.C.1. As such, these components of the proposed leniency process remain a disincentive for corporations to participate in the leniency process.

not to have their cooperating witnesses deposed or otherwise called upon to testify before their criminal investigation and prosecution is complete. Yet, due to the lack of coordination between or formal sequencing of criminal and civil litigation, this can become a real risk. In such cases, it has become increasingly common for the DOJ to attempt to negotiate a limitation or stay of discovery with the parties to the private litigation and, barring that, to intervene in the civil action and move to stay or limit discovery. Such stays are frequently, but not consistently, granted.[501] Going forward, stays may be granted with increasing consistency, and perhaps for increasing lengths of time, in response to the fresh acknowledgement by the Supreme Court in *Bell Atlantic Corp. v. Twombly*[502] of the Court's long-standing concern that discovery in antitrust litigation is particularly expensive and burdensome.[503] Stays may also increase in both frequency and duration to the extent that the lower courts also interpret *Twombly* as an acknowledgement by the Court that it is appropriate to essentially bifurcate pre-trial proceedings in antitrust cases, so that expensive discovery does not begin until after resolution of not only motions to dismiss.

The situation of an amnesty applicant can become even more delicate when the applicant – who has an obligation to make restitution under the DOJ's conditional amnesty agreement – has settled with a customer or a direct purchaser class and the settlement includes an obligation to cooperate in the plaintiff's continuing litigation against other defendants. If, for example, the plaintiff requests an opportunity to depose or interview a knowledgeable employee of the amnesty applicant pursuant to the applicant's cooperation commitments in the settlement agreement while the criminal investigation is still ongoing, the amnesty applicant may find itself facing potentially contradictory cooperation obligations. As with regular discovery, in such circumstances the DOJ has on occasion intervened in the civil litigation to seek to block cooperative depositions or even informal witness interviews by plaintiff's counsel.

E. Developing Private Civil Damages Liability Considerations

This section highlights four developments that continue to mature and are relevant to evaluating the scope of potential civil damages exposure in the United States and the development of potential private damages exposure in Europe:

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[501] *See generally* Niall E. Lynch, *Parallel Proceedings: The Government Perspective*, ABA Section of Antitrust Law 51st Annual Spring Meeting Course Materials 455 (Apr. 3, 2003).

[502] 550 U.S. 544, 127 S.Ct. 1955, 1967 (2007).

[503] *See id.* ("Probably, then, it is only by taking care to require allegations that reach to the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the [discovery] process will reveal relevant evidence to support a § 1 claim.") (Internal quotations omitted) (alternation in original).

(a) passage and application of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 in the U.S., which, as noted above, can operate to reduce the civil damage exposure of successful amnesty applicants;

(b) the United States Supreme Court's decision and subsequent lower-court decisions significantly limiting the circumstances in which U.S. courts may exercise jurisdiction over antitrust claims by foreign parties for damages related to foreign transactions;

(c) passage of the Class Action Fairness Act in the U.S., which will cause more state-law claims by "indirect purchasers" to be litigated in federal court; and

(d) increasing potential for private damages litigation in Europe.

1. De-trebled Damages For Amnesty Applicants

As noted above, in June 2004 the U.S. enacted the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which significantly increased the maximum penalties for antitrust offenses. The statute offers some relief from the usual three-times-actual-damages civil litigation exposure that cartel participants face in the U.S. Specifically, the Act limits damages recoverable from a successful DOJ amnesty applicant by a civil plaintiff to actual damage sustained by the plaintiff "that is attributable to the commerce done by the applicant in the goods or services affected by the violation."[504]

Under this latter provision, reduced damages are available for any civil action that is "based on conduct covered by a currently effective antitrust leniency agreement," where the plaintiff alleges a violation of "section 1 or 3 of the Sherman Act[] or . . . any similar State law."[505] Reduced damages are not available in cases where a state or its subdivision brings a civil suit to recover damages sustained by the state or its subdivision.

Thus, if it qualifies, an amnesty applicant is subjected to substantially reduced damages claims in follow-on civil litigation that is based on the same acts and transactions that gave rise to the applicant's exposure to criminal liability. The maximum civil damages are calculated based on the "commerce done" by the amnesty applicant in the relevant product market.

To qualify for reduced liability under the Act, an amnesty applicant must cooperate with the plaintiffs in the follow-on civil litigation. Procedurally, the court in which the civil action is pending must determine whether the amnesty applicant "has provided satisfactory cooperation"[506] to the plaintiffs based on the following considerations:

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[504] The Antitrust Criminal Penalty Enhancement and Reform Act of 2004, at §213(a).

[505] *Id.*

[506] *Id.* at §213(b).

(1) Whether the applicant provided the plaintiffs with "a full account . . . of all facts known to the applicant . . . that are potentially relevant to the civil litigation";[507]

(2) whether the applicant "furnish[ed] all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant" to the plaintiffs;[508] and

(3) whether the applicant used its best efforts to secure and facilitate from cooperating individuals complete and truthful answers to questions posed by the plaintiffs in the civil case in interviews, depositions or court proceedings.[509]

The court may also consider the timeliness of the amnesty applicant's cooperation with the DOJ in making this determination. Specifically, the Act provides that the following facts are also relevant to the court's determination:

(1) Whether the amnesty applicant approached the DOJ for amnesty protection after a state-issued compulsory process in connection with the underlying antitrust violation; and

(2) whether the amnesty applicant approached the DOJ after a private plaintiff had instituted a civil action in connection with the underlying antitrust violation.[510]

The benefits of the Act are also available to cooperating individuals who are named as defendants in the civil suit. These individuals must meet similar standards before a court will allow the individual to be entitled to reduced civil damages under the Act.

The Act defines an amnesty applicant as a person that has entered an "antitrust leniency agreement,"[511] which is an agreement "between a person and the Antitrust Division pursuant to the Corporate Leniency Policy of the Antitrust Division in effect on the date of execution of the agreement."[512] The Act also contains a sunset clause that makes the Act inapplicable to amnesty

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[507] *Id.* at §213(b)(1).

[508] *Id.* at §213(b)(2).

[509] *Id.* at §213(b)(3).

[510] *Id.* at §213(c).

[511] *Id.* at §212(3).

[512] *Id.* at §212(2).

agreements entered into five years after the enactment of the Act,[513] but has since been extended for another year and now runs until June, 2010.[514]

Despite a limited number of interpretations and applications of the Act, two recent cases suggest that the Act is accomplishing exactly what Congress intended: inducing self-reporting to the Department of Justice by ensuring that the leniency applicant is in no worse of a position after reporting that those companies that did not report the antitrust violation at all.

In *In re TFT-LCD Antitrust Litigation*,[515] the Northern District of California, at the Antitrust Division's urging, denied plaintiffs' motion to force an unknown leniency applicant to disclose its status and immediately begin cooperating or permanently forfeit ACPERA's protections against enhanced recovery. As the court explained, the "assessment of an applicant's cooperation occurs at the time of imposing judgment or otherwise determining liability and damages."[516] That is, the threshold decision of whether to cooperate with civil plaintiffs—and the requisite weighing of costs and benefits necessary to that decision— belongs to the leniency applicant alone.

Nor does ACPERA require that a leniency applicant who cooperates in a civil suit "be at . . . plaintiffs' beck an call."[517] In *In re Sulfuric Acid Antitrust Litigation*, plaintiffs argued that ACPERA, in conjunction with a settlement agreement, required the court to compel depositions of a cooperating leniency applicant's employees.[518] Rejecting plaintiffs' argument, the court determined that ACPERA required only that a cooperating party use its "best efforts" to make the requested employees available for depositions.[519]

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[513] *Id.* at §211.

[514] *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004 Extension Act, Pub. L. No. 111-30, § 2, 123 Stat. 1775 (2009) (extending the Act's date of termination by one year).

[515] 618 F. Supp. 2d 1194 (N.D. Cal. 2009).

[516] *Id*, at 1196.

[517] *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320, 329 (N.D. Ill. 2005).

[518] *Id*. at 329.

[519] *Id*.

However (as noted above), the Act is set to expire in June, 2010.[520] This relatively short life fails to account for the length of time between a leniency applicant's initial decision to cooperate, the resolution of the resulting investigation, and the even longer time needed to resolve subsequent civil litigation. The Antitrust Division's investigation into the DRAM industry began in June 2002, and Micron Corporation entered into a Conditional Leniency Agreement in October of that same yet. Still, over seven years later, both the government's investigation and the civil litigation in that case are ongoing. Many other investigations in which the Division is believed to have an amnesty agreement, including Flash, TFT-LCD, CRT, Puerto Rican Cabotage, and Air Cargo, are also ongoing. Yet, in spite of the examples presented by these protracted cases, it is not clear (in late 2009) whether the Act will be extended past its current sunset date of June 2010.

2. Decreasing, But Still Potential, Risk Of Lawsuits For Foreign Damages

Recent decisions by the U.S. Supreme Court and, subsequently, lower courts in the United States have addressed whether there is jurisdiction in U.S. courts for lawsuits asserting claims for cartel-related damages arising from wholly foreign sales. Specifically, in 2004 the Supreme Court resolved a split among the federal circuit courts of appeals with respect to the application of the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, which addresses the limits of subject matter jurisdiction in U.S. federal courts over claims involving foreign injury caused by foreign cartels.

a) *Empagran*

In *F. Hoffman-La Roche Ltd. v. Empagran S.A.* ("*Empagran*"),[521] the Court held that the FTAIA does not provide subject matter jurisdiction for a Sherman Act claim seeking foreign damages that are independent of any anticompetitive effect on U.S. domestic commerce.

In rendering its decision, the Court recognized an important concern expressed by the DOJ in its filings in *Empagran*: permitting liability for foreign damages claims in U.S. courts could undermine global anti-cartel enforcement efforts. The Court reasoned that recognizing

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[520] Prior to the expiration of the first sunset period on June 23, 2009, the Antitrust Section of the American Bar Association attempted to persuade Congress to extend the Act by five years, arguing that insufficient time had passed to assess the Act's impact. Letter from James A. Wilson, Chair, Section of Antitrust Law, the American Bar Association, to Hon. Patrick Leahy, Chairman, Committee on the Judiciary, United States Senate, Hon. Jeff Sessions, Ranking Member, Committee on the Judiciary, United States Senate, Hon. John Conyers, Jr., Chairman, Committee on the Judiciary, United States House of Representatives, Hon. Lamar Smith, Ranking Member, Committee on the Judiciary, United States House of Representatives (May 8, 2009).

[521] 542 U.S. 155 (2004).

subject matter jurisdiction in the U.S. over such claims risked weakening enforcement by expanding potential treble damage civil liability in the U.S., and thereby decreasing the incentives to disclose cartels to antitrust authorities in exchange for prosecutorial leniency by the government. The Court also explained that a contrary interpretation unreasonably interfered with foreign sovereignty.

While the *Empagran* decision conclusively precludes U.S. subject matter jurisdiction where the foreign injuries claimed by private plaintiffs are independent of the alleged U.S. domestic effect of the cartel, the Court declined to address directly an alternative theory of subject matter jurisdiction that seeks to impose liability if the foreign injury would not have occurred "but for" the domestic effect. The Supreme Court in *Empagran* did make clear that, for subject matter jurisdiction to exist, the U.S. domestic effect of the alleged cartel must give rise to the plaintiff's *claim*. The issue is how close a causal connection there needs to be between the U.S. domestic effect and the foreign injury to give rise to a "claim."

b) *Empagran* On Remand

The Supreme Court remanded *Empagran* to the District of Columbia Circuit to determine whether this alternative domestic effects theory had been properly pleaded and preserved, and, if so, to evaluate the theory. The District of Columbia Circuit held that the alternative claim was properly pleaded and preserved, and in 2005 the court issued an opinion rejecting the alternative theory of liability.[522]

The key issue for the D.C. Circuit was the extent of the connection between U.S. domestic effects and a foreign injury needed to be sufficient to "give rise to" a plaintiff's "claim." Quoting directly from the plaintiffs' brief, the Court summarized the "gives rise to" theory advanced by the plaintiffs:

> Because the appellees' product (vitamins) was fungible and globally marketed, they were able to sustain super-competitive prices abroad only by maintaining super-competitive prices in the United States as well. Otherwise, overseas purchasers would have purchased bulk vitamins at lower prices directly from U.S. sellers or from arbitrageurs selling vitamins imported from the United States, thereby preventing the appellees from selling abroad at the inflated prices. Thus, the super-competitive pricing in the United States 'gives rise to' the foreign super-competitive prices from which the appellants claim injury.[523]

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[522] *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005). Gibson, Dunn & Crutcher served as counsel for one of the defendants in *Empagran.*

[523] *Id.* at 1270.

Although the Court acknowledged that the plaintiffs' theory "paint[s] a plausible scenario"[524] by which maintaining super-competitive prices in the United States might have been a "but-for" cause of their injury, it concluded that "but-for" causation between the domestic effects and the foreign injury is not sufficient to bring the allegedly anticompetitive conduct within the ambit of the FTAIA.[525] The Court held that the statutory language of the FTAIA requires a direct causal relation—not merely a "but-for" connection—between the domestic effects and the foreign injury.

This conclusion, the Court observed, is informed by principles of "prescriptive comity," which the Supreme Court emphasized at some length in its *Empagran* decision and which require that courts construe ambiguous statutes "to avoid unreasonable inference with the sovereign authority of other nations."[526] As the Court noted, "[t]o read the FTAIA broadly to permit a more flexible, less direct standard than proximate cause would open the door to just such interference with other nations' prerogative to safeguard their own citizens from anticompetitive activity within their own borders."[527]

Applying the proximate cause standard to the allegations in this case, the Court found that the alleged domestic effects do not give rise to plaintiffs' claimed injuries so as to bring their Sherman Act action within the FTAIA exception. At best, the Court observed, plaintiffs' allegations established but-for causation. Specifically, plaintiffs' theory did not demonstrate that increased prices in the United States proximately caused the foreign defendants' injuries. Under plaintiffs' theory, it was the foreign effects of price-fixing outside the United States that directly caused their losses when they purchased vitamins in the foreign market at super-competitive rates. The Court held that the fact that the effects in the United States of defendants' allegedly anticompetitive activities were foreseeable does not mean that the U.S. effects proximately caused plaintiff's harm. According to the D.C. Circuit, "[i]t was the foreign effects of price-fixing outside of the United States that directly caused or 'g[a]ve rise to' the [plaintiffs'] losses when they purchased vitamins abroad at super-competitive prices."[528]

The plaintiffs in *Empagran* sought review of the D.C. Circuit's opinion by the Supreme Court, but the Supreme Court recently declined to review the decision.[529]

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[524] *Id.*

[525] *Id.* at 1271.

[526] *Id.*

[527] *Id.*

[528] *Id.* For an analysis of the D.C. Circuit's decision on remand in *Empagran,* see D. Jarrett Arp & Cynthia E. Richman, *Leading Cases,* ANTITRUST REPORT 63, 66 (Issue 3, 2005).

[529] 546 U.S. 1092 (2006).

c) Other Courts & *Empagran*

Since the D.C. Circuit's *Empagran* decision, other courts that have reviewed the D.C. Circuit's analysis have reached similar conclusions. In *In re Monosodium Glutamate Antitrust Litigation*,[530] for example, the *Empagran* decision ultimately convinced both the Eighth Circuit and Judge Magnuson of the United States District Court for the District of Minnesota to adopt a proximate causation requirement. Judge Magnuson initially found that the plaintiffs' claim that the U.S. effects of an alleged worldwide price-fixing conspiracy related to monosodium glutamate ("MSG") and nucleotides were *necessary* to the plaintiffs' foreign injuries was sufficient to permit the action to proceed.[531] The Court later reconsidered the matter and reached a different conclusion in light of the D.C. Circuit's much-anticipated decision in *Empagran*:

> The theory Plaintiffs advance in this case is identical to that advanced in Empagran. In particular, Plaintiffs contend that MSG and nucleotides are fungible and globally marketed, which allowed Defendants to sustain super-competitive prices abroad only by maintaining super-competitive prices in the United States. Plaintiffs further allege that they would have purchased MSG and/or nucleotides at lower prices either directly from United States sellers or from arbitrageurs selling MSG and/or nucleotides imported from the United States, thereby preventing Defendants from selling abroad at inflated prices. Finally, Plaintiffs contend that Defendants accomplished their global price-fixing cartel by creating barriers to international commerce in the form of market division agreements.
>
> This Court is persuaded by the decision and reasoning of the District of Columbia Circuit Court of Appeals in Empagran. The global price-fixing cartel theory establishes only an indirect relationship between United States prices and the prices paid in foreign markets. As such, Plaintiffs can only show that the foreign effect of price-fixing gave rise to their injuries. Because Plaintiffs are unable to show that the domestic effect proximately caused their injuries, Plaintiffs cannot state a claim under the Sherman Act.[532]

The Eight Circuit affirmed Judge Magnuson's judgment, adopting a proximate causation requirement and finding "appellants' causation theory is identical to that presented in *Empagran*."[533] The panel adopted the logic and conclusion of *Empagran*:

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[530] Civ. No. 00-MDL-1328 (PAM) (D. Minn.).

[531] 2005 WL 1080790, at *4 (D. Minn. May 2, 2005).

[532] 2005 WL 2810682, at *3 (D. Minn. Oct. 26, 2005).

[533] 477 F.3d 535, 539 (8th Cir. Feb. 8, 2007).

> Although it may be reasonable to apply our antitrust laws to foreign conduct in certain situations, permitting a standard that is less direct than proximate cause here would unreasonably 'interfere with other nations' prerogative to safeguard their own citizens from anti-competitive activity within their own borders' and violate these comity considerations. We therefore conclude, as did the court in Empagran, that the statutory 'gives rise to' language requires a direct or proximate causal relationship and that this standard is in accord with the principles of prescriptive comity. We believe that this standard is also consistent with general antitrust principles, which typically require a more direct causation standard.[534]

Likewise, in *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*,[535] the Ninth Circuit joined the D.C. Circuit and Eighth Circuit in requiring that a plaintiff prove proximate causation in order to invoke the FTAIA's domestic injury exception.[536] Echoing these other courts, the Ninth Circuit found the proximate cause standard supported principles of comity, consistent with the FTAIA's language and history, and consistent with general antitrust principles.[537] Thus, the Court concluded that a foreign plaintiff could not claim that it suffered an injury under the Sherman Act simply because the plaintiff paid higher prices abroad as part of a conspiracy that also charged higher prices in the United States.[538]

The United States District Courts for the Eastern District of Pennsylvania,[539] the District of Delaware,[540] the Northern District of California,[541] the Southern District of New York,[542]

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[534] Id. at 538 (quoting *Empagran*, 417 F.3d at 1271).

[535] 546 F.3d 981 (9th Cir. 2008).

[536] *Id*. at 987.

[537] *Id*. at 987-88.

[538] *Id*. at 988-89.

[539] *In re Graphite Electrodes Antitrust Litigation*, 00-MDL-1244, 2007 WL 137684, at *6 (E.D. Pa. Jan. 16, 2007).

[540] *In re Intel Corporation Microprocessor Antitrust Litigation*, 452 F. Supp. 2d 555, 560-63 (D. Del. Sept. 26, 2006). Gibson, Dunn & Crutcher served as counsel for one of the defendants in *Intel*.

[541] *In re Rubber Chemicals Antitrust Litigation*, 504 F. Supp. 2d 777, 781-85 (N.D. Cal. Aug. 15, 2007)*; Korea Kumho Petrochemical v. Flexsys America LP*, 2007 WL 2318906, at *4 and n.6 (N.D. Cal. Aug. 13, 2007); eMag *Solutions LLC v. Toda Kogyo Corp.*, Civ. No. C-02-1611, 2005 WL 1712084, at *11 (N.D. Cal. July 20, 2005); *In re Dynamic Random*

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and the District of New Jersey,[543] have also reached similar conclusions. In *Latinoquimica Amtex v. Akzo Nobel Chemicals, B.V., et al.*,[544] for example, the Court evaluated a class action complaint on behalf of a purported worldwide class of foreign purchasers alleging price-fixing related to an intermediate chemical, MCAA. The putative class was allegedly injured by an international conspiracy to price fix MCAA.

In a motion to dismiss, the defendants argued that the FTAIA required the plaintiffs to allege that the domestic effect of the conspiracy *proximately caused* Plaintiffs' injuries, thereby giving rise to their claim. According to the defendants, at most, the complaint alleged *but for* causation. Much like the *Empagran* plaintiffs (at oral argument on remand from the Supreme Court), the *Latinoquimica* plaintiffs conceded that the relevant causation standard is proximate causation. They argued, however, that their complaint satisfied that standard, alleging that the U.S. domestic effect proximately caused their foreign injuries. Like the theory in *Empagran* and the MSG litigation, the plaintiffs argued that the alleged domestic effect of the conspiracy (supracompetitive prices in the U.S.) was *necessary* to prevent arbitrage and transshipment of the product from the U.S. to foreign countries in response to above-competitive prices in those foreign countries. According to the plaintiffs, the domestic effects created conditions without which the alleged foreign price-fixing could not have succeeded.

The court granted the defendants' motion to dismiss (and denied the plaintiffs' motion for leave to amend on grounds of futility). The Court held that the plaintiffs were required to show that the alleged U.S. domestic effect of the conspiracy proximately caused their injuries. According to the Court, the proximate causation standard is "more consistent with principles of prescriptive comity than a looser, 'but for' standard"[545] and because proximate causation is

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Access Memory (DRAM) Antitrust Litigation, MDL-1486, 2006 WL 515629, at *3-5 (N.D. Cal. Mar. 1, 2006). Gibson, Dunn & Crutcher served as counsel for one of the defendants in both *Rubber Chemicals* and *DRAM*, as well as the defendant in *Korea Kumho Petrochemical.*

[542] *Boyd v. AWB Ltd.*, No. 07 Civ. 3007 (GEL), 2008 WL 793633, at *5-6 (S.D.N.Y. Mar. 25, 2008) (rejecting but for causation as grounds for FTAIA subject matter jurisdiction because, in part, a "multitude of 'intervening developments'" apart from the alleged conspiracy could have affected prices); *Latinoquimica Amtex et al. v. Akzo Nobel Chemicals, B.V., et al.,* 2005-2 Trade Cases ¶ 74,974, 2005 U.S. Dist. LEXIS 19788 (S.D.N.Y. Sept. 7, 2005).

[543] *Emerson Electric Co. v. Le Carbone Lorraine, S.A.*, 500 F. Supp. 2d 437, 446-47 (D. N.J. August 9, 2007).

[544] *Id*. Gibson, Dunn & Crutcher and Mr. Arp served as counsel for one of the defendants in *Latinoquimica.*

[545] 2005 U.S. Dist. LEXIS 19788, at *24.

"consistent with antitrust principles requiring that an antitrust injury-in-fact be caused directly by a defendant's conduct."[546]

Applying the proximate causation standard, the Court held that the plaintiffs had not alleged that their "injuries were directly, or proximately, caused by the domestic effect of Defendants' alleged conspiracy," requiring dismissal for lack of subject matter jurisdiction under the FTAIA.[547] In addition, the Court concluded that an Amended Complaint proposed by the plaintiffs did not cure the plaintiffs' pleading deficiencies. This was true because Plaintiffs'

> concept of having been injured by an inevitable 'ripple effect,' as Plaintiffs themselves phrase it . . . , would not be sufficient to afford Plaintiffs standing to maintain their antitrust claims. Similarly, under the FTAIA, the mere inter-dependence of markets cannot be sufficient to satisfy the requirement that a domestic effect 'gives rise to' the plaintiff's claim.[548]

The *Latinoquimica* plaintiffs appealed to the Second Circuit. After briefing was complete, however, the plaintiffs/appellants elected to withdraw their appeal and dismiss their claims with prejudice.

d) Other Circuit Courts Of Appeal

Although the D.C. Circuit, Ninth Circuit, Eighth Circuit, and several federal district courts have thus addressed – and rejected – the "alternative theory" of subject matter jurisdiction over foreign injuries from international cartels,[549] at least one federal district court has allowed foreign damages-based claims to go forward, albeit in a case that was factually distinct from the

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[546] *Id.*

[547] *Id.* at *27.

[548] *Id.* at *36.

[549] The Second Circuit also rejected an attempt to advance the "alternative theory" in *Sniado v. Bank Austria AG*, 378 F.3d 210 (2d Cir. 2004). In *Sniado*, the plaintiff urged the Court to infer from various allegations in his pre-*Empagran* complaint a claim that "the domestic component of the alleged worldwide conspiracy was necessary for the conspiracy's overall success" and that this satisfied the FTAIA. *Id.* at 213. The Second Circuit concluded that, even if it were to agree to make the inferences necessary to set forth "*his* alternative theory of jurisdiction," the allegations would still be insufficient. *Id.* (emphasis added). In other words, even if the plaintiff's allegations – whether actual or inferred – supported the conclusion that his "injury in Europe, *i.e.,* payment of excessive fees, was dependent on the conspiracy's effect on United States commerce," the complaint would still be "too conclusory to avert dismissal." *Id.*

more ambitious *Empagran-Monosodium Glutanate-Latinoquimica* line of complaints.[550] Thus, while the overall trend is toward limiting the jurisdiction of U.S. federal courts to what one would expect to be a very narrow band of cases in which the domestic impact of an alleged international cartel proximately caused the foreign plaintiff's injuries, other court of appeals or district courts may rule on this issue in the future.

For parties seeking to evaluate potential U.S. civil litigation exposure related to purely foreign sales, the probabilities of facing treble-damage exposure in U.S. federal court for alleged injuries suffered "worldwide" are certainly reduced.[551] Notably, both the U.S. DOJ and Federal Trade Commission, as well as the governments of Canada, Japan, Germany, and the Netherlands, filed briefs before the D.C. Circuit in *Empagran* urging a rejection of the "alternative theory." They rightly recognized that, if accepted, the theory would convert U.S. courts into "world courts," interfere with foreign sovereigns' own enforcement regimes, and risk deterring – rather than encouraging – applications for leniency.

3. Class Action Fairness Act: Streamlining And Coordination of U.S. Litigation

As discussed above, U.S. civil litigation flowing from international cartel investigations usually falls into two categories of cases: (i) lawsuits in federal court on behalf of direct customers of the colluding parties and (ii) lawsuits in certain state courts on behalf of so-called "indirect purchasers," parties who purchased the product from someone other than one of the colluding manufacturers. Until relatively recently, indirect purchaser actions typically could not be easily removed or consolidated into a single multi-district litigation proceeding, as would often be the case in federal direct purchaser actions. Any coordination among the state courts – or between the state actions and the federal direct purchaser cases – was dependent on the voluntary cooperation of the counsel and judges involved.

The Class Action Fairness Act of 2005 [552] makes it significantly easier for defendants to remove indirect purchaser actions to federal court to be consolidated with related direct purchaser cases. Although it is still too soon to gauge fully the impact of CAFA, it will likely

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[550] *See MM Global Servs., Inc. v. Dow Chem. Co.*, 329 F. Supp. 2d 337, 339 (D. Conn. 2004) (finding subject matter jurisdiction under the FTAIA where the plaintiffs "purchased [the defendant's] products ***in the United States*** and re-sold them to end-users in India" and alleged that they were injured by the defendant's restrictions on re-sale) (emphasis added).

[551] Apart from causation issues arising under the FTAIA, it should be noted that the Antitrust Modernization Commission has recommended that, "[a]s a general principle, purchases made outside the United States from a seller outside the United States should not be deemed to give rise to the requisite effects under the [FTAIA]." Report and Recommendations of the Antitrust Modernization Commission (April 2007), at 17.

[552] Pub. L. No. 109-002 (codified at 28 U.S.C. §§ 1332, 1453, 1711-1715 *et al*.).

reduce the coordination burdens on defendants trying to manage litigation in multiple U.S. federal and state courts. This is true because, with CAFA in force, in most instances the direct purchaser and indirect purchaser class action lawsuits will end up before one federal judge for purposes of pre-trial proceedings – including a ruling on class certification.

On the other hand, it is far from clear that the Act, considered "litigation reform" by its proponents and generally thought of as favoring defendants, will actually lead to all of the benefits – including reduced litigation costs – envisioned.[553]

Whatever the ultimate impact of CAFA, the fact that indirect purchaser actions will increasingly be brought in federal court raises a host of new procedural and substantive issues. It clearly gives defendants more opportunities to be proactive in requiring coordination of the various lawsuits through existing federal court multi-district litigation consolidation and coordination mechanisms. It may also give rise to more favorable law relevant to class certification, because federal courts will apply the relevant federal rule (Fed. R. Civ. P. 23) instead of varying state law class certification standards.[554]

4. Development of Foreign Private Actions

As stated at the outset of this section, there are clear indications that international cartel participants face growing civil litigation exposure in Europe. Neelie Kroes has publicly advocated for the promotion of greater private enforcement of the EC's competition rules.[555]

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[553] As discussed *supra*, the Antitrust Modernization Commission, while observing that CAFA "may ameliorate some of the administrative issues caused by conflicting federal and state rules," believes "it is time to enact comprehensive legislation reforming the law" with respect to direct and indirect purchaser litigation. Report and Recommendations of the Antitrust Modernization Commission (April 2007), at vi; *see also* Section VI.A above. For a detailed overview of CAFA and its impacts, see Gregory G. Wrobel and Michael J. Waters, *Early Returns: Impact of the Class Action Fairness Act on Federal Jurisdiction Over State Law Class Actions*, ANTITRUST 45 (Fall 2006); D. Jarrett Arp, *Be Careful What You Ask For: Unintended Consequences And Unfinished Business Under The Class Action Fairness Act,* ANTITRUST 8 (Fall 2005) (hereinafter "Unintended Consequences"); Bruce V. Spiva & Jonathan K. Tycko, *Indirect Purchaser Litigation On Behalf Of Consumers After CAFA,* ANTITRUST 12 (Fall 2005); Charles B. Casper, *The Class Action Fairness Act's Impact On Settlements,* ANTITRUST 26 (Fall 2005); Roger D. Blair & Christine A. Piette, *Coupons And Settlements In Antitrust Class Actions,* ANTITRUST 32 (Fall 2005).

[554] *See generally* Ian Simmons & Charles E. Borden, *The Class Action Fairness Act Of 2005 And State Law Antitrust Actions,* ANTITRUST 19 (Fall 2005) (reviewing CAFA's impact and potential benefits from the standpoint of defendants' counsel).

[555] *See* Neelie Kroes, *Reinforcing The Fight Against Cartels And Developing Private Antitrust Damage Actions: Two Tools For A More Competitive Europe*, address before the

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The EC is currently considering a draft law that would harmonize a number of procedural and substantive private litigation issues across Europe including where jurisdiction is proper for a given claim; what damages are allowable in private actions; the role of indirect purchasers in private litigation; discoverability of evidence produced by leniency applicants; and the availability of class actions.[556] The draft law is expected to have its main effects in damages cases involving "hard-core cartel cases following an infringement decision by a competent competition authority [i.e. a] (follow-on action)."[557]

Private actions against cartel participants have also become increasingly available in the UK.[558] The Office of Fair Trade has recently issued a number of recommendations to improve the efficacy of private antitrust actions including the introduction of contingency fee arrangements, cost-capping measures, modifying existing procedures to allow class actions, and requiring UK courts and tribunals to give effect to decisions and guidance by UK national competition authorities.[559] A U.K. energy group, National Grid, has brought a suit seeking more than £200 million in compensation from companies involved in a gas-insulated switchgear cartel that have already paid €750 million in fines to the EC.[560] That said, the U.K. has placed some limits on such litigation, suggesting that asymmetries may develop in Europe relative to the U.S., and that, ultimately, civil exposure for international cartel participants in Europe may not be as severe.[561]

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Commission/IBA Joint Conference on European Community Competition Policy (Mar. 8, 2007) (discussing the European Commission's work to promote more private enforcement of the competition rules and the benefits of creating conditions for more effective private actions in antitrust enforcement in Europe).

[556] Jesus Alfaro & Tim Reher, *The European Antitrust Review 2010: Private Antitrust Litigation*, GLOBAL COMPETITION REVIEW (October 2009).

[557] *Id*.

[558] *See Tribunal Permits Case Against Carbon Cartelist*, GLOBAL COMPETITION REVIEW (Nov. 19, 2007) (reporting approval by U.K. Competition Appeals Tribunal of formal damage claims against a European Commission leniency applicant); *see also UK Moves Towards US-Style Redress Actions*, GLOBAL COMPETITION REVIEW (Nov. 26, 2007) (reporting the endorsement by the U.K. Office of Fair Trading of private, stand-alone competition litigation).

[559] Neil Davis & Lesley Farrell, *The European Antitrust Review 2010: Untied Kingdom: Private Enforcement*, GLOBAL COMPETITION REVIEW (October 2009).

[560] *National Grid Seeks Record Damages*, GLOBAL COMPETITION REVIEW (Dec. 11, 2008).

[561] *See English Court Limits Follow-On Damages Claims*, GLOBAL COMPETITION REVIEW (Oct. 22, 2007) (reporting ruling by the U.K.'s High Court that exemplary damages are unavailable

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Germany has also increased the availability of private actions for damages against international cartel participants.[562] Most notably, Germany has lead the innovation of a new class action damages model whereby third party private companies purchase claims from potential antitrust claimants and aggregate such claims into a single action. A recent ruling by the German Supreme Court allowed a suit by one such private company—Cartel Damage Claims—to proceed against German cement company Dyckerhoff.[563]

Lastly, a Canadian court has certified that nation's first international cartel class action. In stark contrast to the Third Circuit, the Ontario Superior Court of Justice ruled on September 29, 2009 that a class of both direct and indirect purchasers in the hydrogen peroxide cartel case shared common issues, while refusing to evaluate the merits of plaintiffs' underlying claims.[564]

VII. Conclusion: Trends & Challenges For The Future

A. Further Convergence Among Enforcement Authorities Worldwide

Increasing convergence among enforcement authorities worldwide is both a trend and a challenge. Notwithstanding the substantially increased consistency in the leniency policies of the U.S., Canada, Japan, and the EU, there are still some important differences that continue to diminish incentives to apply for immunity with respect to international cartels. International enforcers, with appropriate input from the private bar, should continue to address notable disparities in not only their respective leniency policies, but also their enforcement and sentencing policies. The International Competition Network and its Cartel Working Group is one potential forum for this dialogue. Whatever the forum, the agenda for further discussion should include at least the following items:

- Developing a truly paperless process in all jurisdictions. Recording the statements of lawyers, as the EC presently does, or requiring written submissions, as in Japan, or requiring

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in actions against cartelists already fined by the European Commission); *see also UK Tribunal Rules On Damages*, GLOBAL COMPETITION REVIEW (Oct. 19, 2007) (reporting decision by the U.K. Competition Appeals Tribunal that cartelists granted leniency cannot become the target of private damage claims until all other members of the cartel have exhausted their appeals processes).

[562] *See Germany Finds For Private Damages*, GLOBAL COMPETITION REVIEW (Feb. 21, 2007) (reporting a ruling by a regional court in Dusseldorf to allow a follow-on cartel damages case to proceed).

[563] Peter Scott, *A New Model For Private Damages*, GLOBAL COMPETITION REVIEW (Oct. 13, 2009).

[564] Emily Gray, *Canada Certifies Price Fixing Class*, GLOBAL COMPETITION REVIEW (Oct. 1, 2009).

witnesses or their lawyers to verify written transcripts or summaries of interviews, as in Japan and Korea, encourages counsel to be more formal, more abbreviated, and more lawyerly. These jurisdictions risk depriving themselves of the detail and assistance that the U.S. and Canada regularly enjoy and which a more informal exchange with enforcement agency staff would facilitate.

- Permitting parties to place first-in "markers," which they then later perfect, instead of having to delay reporting while assembling enough background facts to make a full presentation. No company should ever be able to leapfrog over an earlier reporting company while the earlier company is actively providing information to the enforcement authority, but hasn't yet reached some minimum requirement as to the quality of the evidence. A basic description of the collusion and a commitment to accurately report further details of the violation and cooperate with the government on a complete and continuing basis should suffice to secure conditional protection. Marker systems that require extensive factual disclosures, like the EC's recently enacted marker system, negate much of the benefit of inducing an early race to the prosecutor's office.

- Allowing parties sufficient time, rather than a prescribed time limit, to perfect their marker. Enforcement agencies are justified in expecting that leniency applicants move quickly and expeditiously to conduct their internal investigations and report back promptly. However, international cartel investigations are often lengthy and complex, as enforcement agencies well know. Insisting that parties report back within a prescribed time limit discourages the very race that leniency programs create, and also shorts not just the applicant's investigation, but also the quality and quantity of evidence the applicant can provide to the enforcement agency. This creates downstream effects for the enforcement agency during its entire investigation, long beyond the end of the 7-day, 28-day, or 30-day marker period.[565]

- Establishing a procedure for proactive coordination between jurisdictions on fines and priority assignments for jail with respect to individual defendants. The Antitrust Division's relatively recent coordination with the UK's Office of Fair Trading in reaching agreed-upon and interdependent criminal dispositions in both jurisdictions – which, in effect, allowed for the possibility of concurrent prison sentences in the United States and the United Kingdom – is exemplary of the type of inter-jurisdictional cooperation that will be required if competition enforcement agencies with authority to bring criminal prosecutions wish to maximize the incentive for cartel participants to cooperate in each jurisdiction.

- Considering the long-term effect on the incentive structures for second, third, and subsequent cooperators of imposing ever-increasing fines and insisting on greater numbers of carveouts for criminal prosecution. At some point, enforcement agencies may reach an equilibrium between incentive and punishment, and the current flood of leniency applicants may start to

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[565] For a more detailed discussion of the issues relating to time limits on markers, see *GCR Roundtable*, at 29-30.

slow. A steady reduction in the value of rewards for the same level of cooperation may mean that companies choose not to report and take their chances.[566]

B. The Future Of International Cartel Enforcement

Over the past dozen years, we have seen cartel enforcement increase significantly every year, a trend that is guaranteed to continue. Enforcement officials from every major jurisdiction report that their pipelines are full of investigations and imminent prosecutions of international cartels. Counsel representing corporations and individuals who are facing The Decision must be prepared to meet this challenge of enforcement in multiple jurisdictions and multiple fora, at a time when important new developments are taking place on virtually a weekly basis. Several of these developments portend even greater international cartel enforcement and bear watching:

- The continuing implementation of new competition laws and new, effective amnesty programs in jurisdictions worldwide, which means greater exposure, and also greater incentives to self-report.

- The willingness of enforcement agencies such as the European Commission, the Canadian Bureau of Competition, the KFTC, the JFTC, the ACCC and the OFT to revise their leniency policies after even relatively short periods of time, as well as the large number of enforcement agencies participating in ICN leniency workshops, which demonstrates a growing recognition among government agencies that workable leniency policies are the key to detecting and prosecuting cartels and that, to be effective in the international arena, leniency policies must be compatible across jurisdictions.

- The willingness of enforcement agencies with criminal authority to coordinate on reciprocal or interdependent plea agreements or other criminal dispositions with common defendants that permit agreed-upon jail sentences in the respective jurisdictions and provide for a credit or set-off in one jurisdiction for the time spent in incarceration in the other jurisdiction.

- The de-trebling of damages for amnesty applicants in the U.S., which may provide greater incentives for self-reporting.

- Significantly increased cooperation and coordination among enforcement agencies, which not only increases the risk of detection, but also reduces the number of safe enclaves in which cartel participants can escape prosecution.

- The commitment of the U.S. DOJ to make extradition requests for individuals who have been charged with cartel activity but refuse to submit voluntarily to U.S. jurisdiction. If the U.S. were to make further requests, it would rank as one of the most significant advancements in anti-cartel enforcement. Once cartel participants no longer think they are safely harbored in their home jurisdiction's borders, the likely sources of self-reporting are certain to multiply and cause another upward bounce in anti-cartel enforcement activity around the world.

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[566] *See id.* at 23.