

Cracking Cartels – Criminalization, Amnesty and International Cooperation

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UNITED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

Antitrust Enforcement Hierarchy

- Anti-cartel enforcement
 - Repugnant conduct; no harm from enforcement
- Merger regulation
 - Most mergers benign; economic analysis
- Unilateral conduct
 - Most controversial; risk of “false positives”



Criminalization – Growing Trend

- Criminal sanctions
 - Greatest deterrent for individuals
 - Fines reimbursable
 - Social stigma
- OECD Second Report on Effective Action Against Hard Core Cartels (Jan. 2003)



International Cartels – Top Criminal Enforcement Priority

- Shift in focus in mid 1990s due to increasing globalization of business
- Huge volumes of affected commerce
- Hard core conduct - price fixing, bid rigging, market share allocation, customer allocation, territorial allocation
- Effectiveness of schemes
- Duration (Sorbates - 17 years, Vitamins - 9 years)



US/Australia Antitrust Cooperation

- 1982 – First US/Australia antitrust cooperation agreement (US's second)
- 1999 – IAEAA agreement with Australia
- 2004 – US/Australia Free Trade Agreement (Competition Law and Policy Chapter)



International Antitrust Enforcement Cooperation

- Multilateral efforts to promote sound policy and practice
 - OECD, ICN, WTO
- International Cartel Workshops
- Cooperation agreements
- Investigative assistance for foreign-located evidence
 - MLATS, IAEAA, Letters Rogatory, Exercise of domestic powers at request of foreign government
- Coordination of enforcement activities to avoid destruction of evidence
 - Searches, Subpoenas, Drop-in interviews, Filing of charges



Amnesty Programs

- Most Effective Means of Cartel Detection
 - Cooperation of insiders
 - Access to evidence regardless of location
 - Investigations shortened; resources saved
 - *Cartels ended*
- Incentives for Cartel Participants
 - Company avoids criminal fine
 - Cooperating directors, officers, employees avoid fine and jail
 - Detrebling of civil damages
 - The catch: Only first to qualify gets it



Enhanced Amnesty Incentives

- Antitrust Criminal Penalty Enhancement and Reform Act of 2004
 - Detrebled private damages for cooperating amnesty applicants
 - Increased maximum corporate statutory fine to \$100 million, maximum individual fine to \$1 million, and maximum jail term to 10 years



Information Sharing Involving Amnesty Applications

- Confidentiality Policies
 - Division does not share identity of, or information from, amnesty applicant with foreign authorities unless applicant agrees
 - Other amnesty jurisdictions have uniformly adopted confidentiality policies requiring applicant's consent for disclosure to other governments
- Amnesty applicants routinely consent to sharing of information so jurisdictions may conduct coordinated investigations



International Cooperation - *Empagran*

- The Question: How much contact with U.S. needed for treble-damages jurisdiction?
- Danger of harm to U.S. and international amnesty programs
- Amicus briefs filed by Germany, Belgium, United Kingdom of Great Britain and Northern Ireland, Kingdom of the Netherlands, Japan and Canada
- 8-0 win for the U.S./international enforcement position
- Network of government enforcers crack cartels; not U.S. civil damages plaintiffs



Convergence of Amnesty Programs

- U.S. learned from mistakes of 1978 policy
- 1993 policy provided necessary transparency and predictability
- Other jurisdictions following transparency/predictability model
 - Promotes simultaneous applications in multiple jurisdictions
 - Increased opportunities for international cooperation, including coordinated raids/interviews/subpoenas



Practical Advice for Business

- Recognize the growing consensus on repugnancy of cartel conduct and newly severe consequences
- Conduct appropriate compliance programs so employees recognize and avoid improper conduct
- If improper conduct is discovered, act promptly to obtain amnesty and end wrongdoing
- Take advantage of the resources and guidance offered by enforcement agencies such as ACCC and USDOJ



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