INTERNATIONAL CARTEL ENFORCEMENT

AND

LENIENCY PROGRAMS

A GLOBAL PERSPECTIVE

By

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Presented Before

The ICN Workshop on Leniency Programs
November 22-23, 2004

And

The ACCC Cracking Cartels Conference
November 24, 2004

Sydney, Australia

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I. Introduction

The dramatic surge in worldwide cartel enforcement activity in the last decade has been striking and shows no evidence of ebbing. Perhaps the single most significant factor in this 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.

The message of these developments is very clear: anti-cartel enforcement is an increasingly global enterprise on both the government and private levels, and counsel for defendants involved in international cartel matters must think, and act, on a global basis.

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* This paper is an updated and revised version of earlier papers presented at the American Bar Association Section of Antitrust Law 2003 Annual Meeting (August 12, 2003), the International Bar Association 2003 Conference (September 15, 2003), the American Bar Association Section of Antitrust Law 2004 International Cartel Workshop (February 5, 2004), the American Bar Association Criminal Justice Section 2004 White Collar Crime Institute (March 5, 2004), the Center For International Legal Studies conference on Protection of Intellectual Property Rights & Unfair Competition in the International Marketplace (March 18, 2004), and the International Bar Association's Global Competition Forum (April 23, 2004).

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II. History Of The United States Leniency Policy

A. The Initial Leniency Program

The Antitrust Division's original Corporate Leniency Policy was initiated in October 1978 under then-Assistant Attorney General John Shenefield.[1] Under this policy, amnesty was available only to organizations that came forward before the Division had initiated an investigation. The grant of amnesty was dependant on prosecutorial discretion and was not automatic.[2]

The policy was far from an overwhelming success, despite attracting an initial flurry of interest.[3] In the first ten years of the policy, only four companies qualified for amnesty: two in 1978, one in 1983, and one in 1984/85.[4] In the fourteen and a half years that the policy operated, a total of only 17 corporations even applied for amnesty.[5] The Division granted amnesty to only ten of these applicants.[6]

B. The 1993 Revisions: The New Corporate Leniency Policy

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. Eleven years ago, 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.[7]

First, the policy was changed to ensure that amnesty is automatic if there is no pre-existing investigation. That is, if a corporation 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

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1 *See* John H. Shenefield, *The Disclosure of Antitrust Violations and Prosecutorial Discretion*, address before the 17th Annual Corporate Council Institute (Oct. 4, 1978).

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

3 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").

4 Robert E. Bloch, *Past Practice and Future Promise: The Antitrust Division's Corporate Amnesty Program*, ANTITRUST 28, 29 (Fall 1993) (citing statistics from the Antitrust Division's Office of Operations).

5 *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") <http://www.usdoj.gov/atr/public/speeches/speech1grs.htm>.

6 *Id.*

7 *See* Bingaman, *Some Initial Thoughts.*

prosecutorial discretion.[8]

Second, the Division created an alternative amnesty, whereby amnesty is available even if cooperation begins after an investigation is underway.[9]

Third, if a corporation qualifies for automatic amnesty, then all directors, officers, and employees who come forward with the corporation and agree to cooperate also receive automatic amnesty. In addition, executives of a corporation 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.[10]

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.[11] As time passed, the Division also made important clarifications to critical features of the policy:[12]

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 corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of,

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[8] *See* U.S. Department of Justice, Antitrust Division, *Corporate Leniency Policy,* August 10, 1993, Part A (hereinafter "DOJ Corporate Leniency Policy") <http://www.usdoj.gov/atr/public/guidelines/lencorp.htm>.

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

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

[11] 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 and Procedure Workshop, ABA Section of Antitrust Law (Feb. 23, 1995) <http://www.usdoj.gov/atr/public/speeches/95-02-23.txt>; 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") <http://www.usdoj.gov/atr/public/speeches/1626.htm>; 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") <http://www.usdoj.gov/atr/public/speeches/2247.htm>. 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 American Bar Association Antitrust Spring Meeting (Apr. 8, 1994) <http://www.usdoj.gov/atr/public/speeches/94-04-08.txt>; Anne K. Bingaman, *The Clinton Administration: Trends in Criminal Antitrust Enforcement*, address before the Corporate Counsel Institute (Nov. 30, 1995) <http://www.usdoj.gov/atr/public/speeches/speech.n30.txt>.

[12] *See* Spratling, *Answers to Recurring Questions*; Spratling, *Corporate Leniency Policy Update*.

the activity."[13] Recognizing that this language presented interpretive ambiguity and could be read to exclude a significant range of potential amnesty applicants, the DOJ clarified that its policy disqualifies an amnesty applicant only if it is the singular organizer or the singular ringleader of the cartel activity.[14]

2. Disclosure to Foreign Authorities. The Division found that almost invariably, when a company was considering whether to report their involvement in international cartel activity, they 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. They felt that such a policy was in everyone's interest. The DOJ had no doubt that amnesty applications would dry up if they disclosed such information, and, consequently, that large numbers of international conspiracies would go unreported. Moreover, amnesty applications led the Division to other conspirators and to additional evidence provided by them – information that the Division would and did share with foreign government agencies, and that was not protected by the amnesty applicant's agreement with the Division.[15]

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. Defense counsel raised questions about whether a company's amnesty protection could be expanded to include the

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[13] 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.*

[14] *See* 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 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.").

[15] *See* Spratling, *Corporate Leniency Policy Update*.

newly discovered conduct. 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.[16]

4. Model Amnesty Letter. In the interest of transparency and predictability, the DOJ created a model conditional amnesty letter that is publicly available for prospective applicants to review.[17] The letter states the particular obligations of an amnesty applicant, including the specifics of what precise cooperation is necessary and a requirement that the applicant make restitution to victims of the cartel. The letter also binds the government in certain respects beyond the obvious commitment to provide immunity if the applicant meets the letter's conditions. For example, the DOJ agrees in the model letter that disclosures made to the DOJ by counsel for the amnesty applicant in furtherance of the amnesty application will not constitute a waiver of the attorney-client privilege.[18]

III. The Impacts 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. 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 ten years ago. 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.

Available data illustrates this dramatic growth. Indeed, 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, there had been 72 foreign corporations and 90 foreign individuals – for a total of 162 foreign defendants – subject to criminal prosecution by the U.S. DOJ.

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16 *Id.*

17 *See* Spratling, *Answers to Recurring Questions* (introducing and attaching Model Amnesty Letter).

18 *See id.*

A. 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.[19] The Division emphasizes that only the first in the door gets amnesty, 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.[20]

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.[21]

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.[22] In one matter the authors are familiar with, counsel for two different cartel participants contacted the Division less than 10 minutes apart.

B. Increase In The Number Of Applications For Amnesty

As word of the policy's benefits spread, more and more corporations came and continue to come forward, reporting their activities, and seeking amnesty. Prior to August 1993, the Division

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[19] *See* 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") <http://www.usdoj.gov/atr/public/speeches/6487.htm>; Spratling, *Corporate Leniency Update*.

[20] *See* Hammond, *Lessons Common To Detecting And Deterring*; Spratling, *Corporate Leniency Update*; Phillip H. Warren, *An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program*, address before the California Bar Association's Golden State Antitrust and Unfair Competition Law Institute (Oct. 21, 2004) (hereinafter "Overview of Recent Developments"), at 8.

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

[22] *See*, *e.g.*, Jeff Chorney, *Antitrust Prosecutors Breaking Cartels With Immunity*, THE RECORDER, September 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.

received an average of one amnesty application per year.[23] Under the new policy, the rate has jumped to approximately two per month.[24]

C. 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. To further that end, 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.

1. Amnesty Plus And Penalty Plus: The Carrot And The Stick

One of the ways in which the Division encourages the reporting of information about additional cartel activities is by rewarding those who report under certain circumstances and significantly penalizing those who do not.

a) Amnesty Plus

The Antitrust Division initiates approximately one-half of its international cartel investigations as spin-offs of ongoing investigations.[25] As the Division observed this pattern developing in the early years of the amnesty policy, it developed a proactive program, "Amnesty Plus,"[26] 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.

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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[23] Warren, *Overview of Recent Developments*, at 8.

[24] *See* R. Hewitt Pate, *Securing the Benefits of Global Competition*, address before the Tokyo American Center (Sept. 10, 2004), at 10 (hereinafter "Securing the Benefits").

[25] Warren, *Overview of Recent Developments*at 9.

[26] *See* Spratling, *Corporate Leniency Policy Update; see also* 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").

b) 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. 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.

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, if could mean the difference between no jail and a lengthy jail sentence.[27]

2. 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 Antitrust Division attorneys to ask the so-called "omnibus question" at the conclusion of a witness interview (or grand jury interrogation).[28] 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 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.[29] The

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[27] *See* 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 to the National Institute On White Collar Crime (Mar. 8, 2001), at 7 (hereinafter "Calculating the Costs and Benefits") <http://www.usdoj.gov/atr/public/speeches/7647.htm> (discussing Penalty Plus); Spratling, *International Cartel Enforcement Environment*, at 25.

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

[29] 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.

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.

D. Increase In Penalties

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.[30]

1. Fines In Cartel Cases

Since the beginning of fiscal year 1997, the Antitrust Division has obtained over $2.5 billion dollars in fines from criminal defendants.[31] As noted above, the Division has stated that assistance from amnesty applicants has been the foundation for the imposition of over 90 percent of that $2.5 billion in fines. The largest of these fines, the $500 million fine levied against Hoffman-La Roche in 1999 for its involvement in the vitamins cartel, is the largest fine ever imposed in a criminal prosecution of any kind anywhere in the world.

2. Increase In Jail Sentences

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.[32] Since FY 1999, courts have imposed over 100 years in prison on

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[30] Warren, *Overview of Recent Developments*, at 8; 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"), <http://www.usdoj.gov/atr/public/speeches/201199.htm> (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.").

[31] *See* Hammond, *Cornerstones*, at 1.

[32] *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 (hereinafter "Statement") (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."). For a further discussion of this issue, see Gary R. Spratling, *New Trends Create An Even Riskier Target Zone For International Cartel Participants*, address to the National Institute On White Collar Crime (Mar. 8, 2001) ("Trend #1: The United States

[Footnote continued on next page]

individual defendants in connection with antitrust and related offenses, and more than 40 defendants have received terms of one year or longer.[33]

In FY 2002, the Division secured over 10,000 jail days against individual defendants in domestic and international cases, an average of 18 months per defendant.[34] That figure includes 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.[35]

In FY 2003, the Division secured sentences of one year or greater for nine defendants, with an average sentence of 21 months. In FY 2004, the Division also obtained sentences of one year or greater against nine individuals, securing a total of over 7300 jail days against 20 defendants.[36]

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.

3. The Antitrust Criminal Penalty Enhancement And Reform Act Of 2004

In June of this year, the U.S. enacted legislation that provides for very important changes in the enforcement and incentive structures under the Sherman Act, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004.[37] The new legislation has three critical provisions: (i) an increase in the maximum fine for a corporation 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 reduction in the civil damages exposure of an amnesty applicant from treble damages to actual damages caused by the amnesty applicant.

[Footnote continued from previous page]
Is Now Seeking To Obtain Jail Sentences More Frequently Against Foreign Individuals Involved In International Cartels").

33 Warren, *Overview of Recent Developments,* at 3.

34 *Id.* at 3.

35 *Id*. at 9.

36 *Id*. at 2.

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

E. 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 carrying out what has turned out to be a blockbuster program for the Division, and the Division has stated that the amnesty program is its most effective generator of international cartel cases.[38]

In mid-2002, the Division had over 30 sitting grand juries investigating cartel activity that was international in scope.[39] By mid-May of 2003, that number had risen to 40.[40] Currently, there are approximately 50 sitting grand juries investigating international cartel activity, which account for roughly one-third of all of the Division's grand juries.[41]

The overwhelming majority of large fines imposed on antitrust defendants have been against organizations involved in international cartels. For example, in every 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 22 of the 27 instances in which the fine was $20 million or greater, and in 39 of the 46 instances in which the fine was $10 million or greater, the organizations were foreign-based.[42]

The expansion of the Division's international cartel program has also 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, the Netherlands, Norway, Sweden, Switzerland, and the United Kingdom. Defendants from Canada, Germany, Switzerland, Sweden, the Netherlands, Norway, the United Kingdom, Japan, and France have all served or are currently serving prison terms in the U.S.[43]

IV. Impact Of The 1993 Amnesty Policy On International Cartel Enforcement: Leniency Fever & Convergence

A. Introduction

The success of the DOJ's 1993 Amnesty Program has led other countries to adopt leniency programs – now viewed as a critical component of a modern, viable anti-cartel enforcement strategy. As a consequence, leniency policies are cropping up around the globe. In August 1993,

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38 Warren, *Overview of Recent Developments*, at 8.

39 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.

40 *See* Pate, *Anti-Cartel Enforcement*.

41 Warren, *Overview of Recent Developments*, at 2.

42 U.S. Department of Justice, Antitrust Division, *Sherman Act Violations Yielding a Fine of $10 Million or More.*

43 *Id.* at 3.

only one jurisdiction outside of the U.S. had a leniency policy, Canada. 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 increased. In addition to the EU, Canada, the United Kingdom, and Australia (discussed in detail below), a growing number of countries have also developed or are in the process of developing their own leniency policies, including Japan, South Africa, Switzerland, the Netherlands, Germany, Hungary, France, Ireland, the Czech Republic, Brazil, Norway, Poland, Cyprus, Belgium, Finland, Latvia, Lithuania, Luxembourg, Slovakia, Sweden, and Korea.

As set forth below, most of the policies have either been patterned after the DOJ policy or eventually gravitated toward the DOJ approach in most respects. This convergence in policies has been critical to encouraging the reporting of international cartels.

Although the leniency policies in different jurisdictions will and do vary in certain respects, 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.

With these considerations in mind, this section assesses the current status of convergence in the leniency area. To do so, it reviews and compares a selection of immunity policies, focusing on Canada and EC, unquestionably the two most important jurisdictions in international cartel enforcement in addition to the U.S.

B. Canada

Canada's immunity policy, Immunity Program Under the Competition Act, ("Immunity Bulletin"),[44] closely mirrors the U.S. policy and, like the U.S. policy, has been highly successful in encouraging cartel participants to come forward.

1. Canada's Immunity Bulletin

The Competition Bureau issued its current Immunity Bulletin in 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 prosecution.[45]

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[44] Competition Bureau Information Bulletin, Immunity Program Under the Competition Act (Sept. 21, 2000) (hereinafter "Immunity Bulletin") <http://cbbc.gc.ca/epic/internet/incbc.nsf/vwGeneratedInterE/ct01990e.html>.

[45] 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. 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 (hereinafter "One Year Later") <http://www.mcmillanbinch.com/AboutUs.aspx?Section1=AboutUs&Section2=Publication>; Martin Low, *The Competition Bureau's Immunity Program: A View of Policy and Practice in Canada*, address

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The Immunity Bulletin, which adopts virtually all of the core elements of the U.S. policy, reflects a recognition by Canada that the U.S. policy was working well and that, while Canada could have elected to take a divergent approach, the larger objective of encouraging the reporting of cartel affecting North America was best served by complementary policies that are largely consistent.

As in the U.S., under the Canadian policy immunity 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.[46] 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, 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, and it must make restitution.[47]

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.[48] 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.

The Bulletin states clearly that the Bureau will not give any special treatment to an immunity applicant simply because it has been granted immunity or leniency in another jurisdiction, an important point that counsel must not overlook in this or any other jurisdiction.[49]

Even with this last caveat, there is no doubt that the convergence between the two policies is a great boon to anti-cartel enforcement in North America and the world. In many product areas, activities that impact competition the U.S. are highly likely to have some impact in Canada, and parties that seek amnesty in the United States will frequently, unless strategic reasons dictate otherwise, want to seek immunity in Canada. The similarities in the two policies make it easy for counsel to move into both jurisdictions quickly and with a minimum of extra effort, which benefits both the applicant and the enforcers – and provides even greater peril for the cartel participants that get left behind in one or both jurisdictions.[50]

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before IBRAC 7th International Competition Conference (Nov. 23, 2001) at 1-2 (hereinafter "A View of Policy and Practice").

46 Immunity Bulletin ¶ 13.

47 *Id.* ¶ 14.

48 Competition Bureau, *Immunity Program – Frequently Asked Questions*, ¶ B (hereinafter "Immunity Program FAQ") < http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02312e.html>.

49 Immunity Bulletin ¶ 31.

50 For a discussion of recent developments in Canada's cartel enforcement program and related civil litigation, *see* D. Martin Low and Omar Wakil, *Cartels/Criminal Enforcement: Canadian Developments*,

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Recently, Sheridan Scott, the Commissioner of Competition, announced that the Competition Bureau would be clarifying certain aspects of the Immunity Bulletin in order to further enhance the certainty of the policy and therefore provide further incentive for self-reporting.[51]

2. Remaining Differences

Although the two policies are quite similar, the Canadian and U.S. policies differ in at least three respects. In addition, the Competition Bureau has recently signaled two modifications to the immunity process which differ markedly from U.S. practice.

1. "Any and all offences." The Bulletin requires that a party "must reveal any and all offences in which it may have been involved."[52] This provision has been one of the most controversial parts of the Canadian policy. On paper, it differs quite sharply from the U.S. policy, but in application has differed very little from U.S. practice.

The provision raises two issues. First, it appears to apply to literally any and all offenses, from offenses under the Competition Act to environmental violations to nonpayment of parking tickets. Second, it requires such information up front, at the outset of the investigation, when many counsel are still in the process of ferreting out even the most basic details of the specific conduct at issue.

In the United States, the Division does expect that amnesty applicants will report additional behavior as appropriate, and it creates compelling incentives (Amnesty Plus and Penalty Plus) and requirements (answering the omnibus question) that generally lead to that result. However, the Division does not expect that amnesty applicants will reveal, or even know of, any and all offences at the outset of an investigation, nor do they expect that amnesty applicants will reveal information about non-antitrust offenses.

In oral statements and in practice, however, the Bureau has not insisted on a cathartic cataloguing of all possible violations. Instead, they only expect that the immunity applicant will share information about Competition Act offenses. The Bureau has now stated this expectation in

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address before the ABA Section of Antitrust Law 2004 Fall Forum (November 19, 2004) (hereinafter "Cartels/Criminal Enforcement").

51 *See* Sheridan Scott, *Speaking notes for Sheridan Scott, Commissioner of Competition, Competition in a Dynamic Marketplace*, address before the Canadian Bar Association Annual Conference on Competition Law (Sept. 23, 2004) at 10 <http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02950e.html>.

52 *Id.* ¶ 16.a. The Bureau ultimately included this provision in the final Immunity Bulletin in order to protect the credibility of the immunity applicant as a witness at the trial of other cartel members, by airing, in advance, any offenses that might otherwise prejudice the applicant's credibility, and because such a requirement is an obvious source of information about related and other offenses. *See* Calvin S. Goldman and Mark Katz, *A Canadian Perspective on International Cartel Investigations and Prosecutions*, address before the American Bar Association Advanced International Cartel Workshop (Feb. 15-16, 2001) (hereinafter "A Canadian Perspective").

writing, referring to the obligation to report "all criminal anti-competitive behavior contrary to the Competition Act relating to the product for which immunity is sought."[53]

2. Not the sole beneficiary in Canada. The Immunity Bulletin also requires that the immunity applicant not be the sole beneficiary of the activity in the Canada, which raises potentially troubling issues. It leaves open the question of whether a participant in the cartel, simply by virtue of being the largest player in Canada in a particular market, could be considered the sole beneficiary.[54] In practice, however, the Bureau has not followed this interpretation.

3. No absolute guarantee of immunity. Because the Attorney General has exclusive authority to grant immunity in competition cases,[55] the Competition Bureau's recommendation of immunity is not legally binding on the Attorney General. On paper, this kind of uncertainty is somewhat discomforting. In practice, however, the Attorney General has consistently followed the recommendations of the Commissioner, and it is generally understood that the Attorney General has never rejected a recommendation for immunity in a competition case.

This kind of practice demonstrates that, as with the United States' policy, certainty lies not just in the way the policy is written, but in the manner in which the enforcement agency interprets and carries it out.

4. Practical Issues. Collette Downie, Assistant Deputy Commissioner of the Bureau's Criminal Matters Branch, recently stated that the Bureau believes, as a rule of thumb, that applicants for immunity should be in a position to move forward within 10 days of placing a marker with the Bureau, and that they should be prepared to give a proffer within 30 days.[56] This is a notable difference from the U.S. and other jurisdictions, and may act as a disincentive for parties who, while mindful of the need for prompt self-reporting, want to conduct a thorough internal investigation.

In addition, Downie stated that proffers of conduct must now address all elements of the Section 45 offense.[57] In particular, the proffer must address the economic effects of the conduct in Canada, because unlike U.S. law, Canadian prohibits only cartel conduct that unduly lessens or prevents competition. Pursuing this line of inquiry will likely add to the length of time it takes to conduct an investigation and prepare a proffer, making the coordination among applications to the U.S., Canada, the EU and other jurisdictions a more complicated process.

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53 *Immunity Program FAQ* ¶ B.

54 For a discussion of the purposes behind including this provision in the policy, see Low, *A View of Policy and Practice*, at 6-7.

55 Immunity Bulletin ¶ 11.

56 Presentation by Colette Downie, Competition Bureau, at the CBA National Competition Law Conference, *cited in* Low and Wakil, *Cartels/Criminal Enforcement*, at 5.

57 *Id* .at 8.

C. European Union

The European Commission is the enforcement agency with the most significant recent changes to its leniency program. The EC's new Notice on Immunity From Fines and Reduction of Fines in Cartel Cases (the "2002 Leniency Notice") issued in February 2002,[58] represents another major step toward convergence in U.S., Canadian, and EU amnesty programs, and it has led to striking results.

Notably, the Commission received 20 applications in the first year of the new policy – a larger number of applications than it received in total during the six years under its prior policy.[59] In the two years after the policy went into effect, the Commission received well over 50 applications for leniency.[60] This great increase reflects the fact that the 2002 Leniency Notice offered increased transparency and certainty for immunity applicants – and included many of the material provisions contained in the DOJ Corporate Leniency Policy and Canada's Immunity Bulletin. As developed below, this represented a substantial change from the EC's original leniency notice, but it does not fully align the EC policy with those of the U.S. and Canada.

1. 2002 Leniency Notice

In 1996, the EC adopted its first Notice on the Non-Imposition or Reduction of Fines in Cartel Cases (the "1996 Leniency Notice").[61] The 1996 Leniency Notice, however, failed to provide some of the guarantees and procedures that were central to the U.S. and Canadian policies, including complete immunity – or even a guarantee of any leniency in penalties at all – to the first to report anticompetitive activities. These considerations, among others,[62] led to perceptions that the 1996 Leniency Notice did not offer prospective applicants protections that were predictable, reliable, and sufficiently attractive to merit cooperation with the Commission.

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58 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") <http://europa.eu.int/eurlex/pri/en/oj/dat/2002/c_045/c_04520020219en00030005.pdf>.

59 Bertus van Barlingen, *A View From the Inside: The European Commission's 2002 Leniency Notice After One Year of Operation,* ANTITRUST 84 (Spring 2003) (hereinafter "Bertus van Barlingen") (republished by the EC at EC COMPETITION POLICY NEWSLETTER 16 (Summer 2003) <http://europa.eu.int/comm/competition/publications/cpn/cpn2003_2.pdf>).

60 *See* Mario Monti, *The New Shape of European Competition Policy*, address before the Inaugural Symposium of the Competition Policy Research Center (Nov. 20, 2003) <http://jpn.cec.eu.int/english/press-info/4-2-133.htm>.

61 Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases, 96/C807/04, 1996 O.J. (C 207) (hereinafter "1996 Leniency Notice") <http://europa.eu.int/comm/competition/antitrust/legislation/96c207_en.html>.

62 In addition, parties who were second in the door behind the lead immunity applicant were promised only a reduction of somewhere in the range of 10 to 50 percent of the fine – much less than what has been granted under the U.S. and Canadian policies. Also, applicants for a fine reduction of 75 percent or more qualified only if they had had "not compelled another enterprise to take part in the cartel and [had] not acted as an instigator or played a determining role in the illegal activity." The terms "an instigator" and "played a determining role" were inherently subjective and potentially overbroad.

In February 2002 the EC issued the 2002 Leniency Notice, which made substantial steps toward a leniency policy that is more transparent, predictable, and aligned with the U.S. and Canadian approaches.[63] Like Canada and the U.S., the 2002 Leniency Notice provides a guarantee of full immunity for qualifying applicants.[64] The 2002 Leniency Notice, like the analogue policies in the U.S. and Canada, also provides for written confirmation of conditional immunity early in the amnesty process.[65] It commits the EC to granting a qualifying applicant conditional immunity in writing as soon as the applicant has shared its evidence with the Commission or has described the evidence in hypothetical terms.[66]

For companies that are not candidates for full immunity but wish to reduce their fines through cooperation with the EC, the 2002 Leniency Notice provides that a certain range of percentage fine reduction will be forthcoming from the Commission based on how quickly they report their involvement and provide the required cooperation as compared with other non-immunity applicants. The first qualifying non-immunity applicant will receive a 30-50 percent reduction in the otherwise applicable fine; the second in the door will enjoy a 20-30 percent reduction in fine.[67]

The role-in-the-offense disqualification standard in the 2002 Leniency Notice seeks to provide a less subjective, more predictable standard than the 1996 Leniency Notice by requiring that a company seeking full immunity "did not take steps to coerce other undertakings to participate in the infringement."[68] The earlier policy required that applicants for the maximum fine reduction of 75 percent not have "acted as an instigator or played a determining role in the illegal activity."

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63 For a full discussion of the new policy and interpretive issues the EC needed to address, see D. Jarrett Arp & Christof R.A. Swaak, *A Tempting Offer: Immunity from Fines for Cartel Conduct Under the European Commission's New Leniency Notice*, ANTITRUST 59 (Summer 2002) <http://www.gibsondunn.com/practices/publications/detail/id/609/?pubItemId=6621>. For the Commission staff's response to this article and their elaboration on the policy, *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). The van Barlingen response to Arp & Swaak has now been republished by the Commission in its Competition Policy Newsletter. *See* Competition Directorate-General of the European Commission, EC COMPETITION POLICY NEWSLETTER 16 (Summer 2003) <http://europa.eu.int/comm/competition/publications/cpn/cpn2003_2.pdf>.

64 2002 Leniency Notice ¶ 8.

65 The U.S. DOJ customarily issues a conditional amnesty letter. *See* Spratling, *Answers to Recurring Questions* (including a sample conditional amnesty letter). The Canadian authorities issue a Provisional Guarantee of Immunity. *See* Immunity Bulletin ¶ 22.

66 2002 Leniency Notice ¶¶ 13 & 15.

67 *Id.* ¶ 23.

68 *Id.* ¶ 11(c). In other words, short of affirmative coercion of other competitors to participate in a cartel, an immunity applicant need not worry that it will be disqualified from full immunity because it was in some sense an organizer or leader of the activity. This is a significant change for the EC, and one that the U.S. DOJ has welcomed. *See, e.g.,* Hammond 2002 Spring Meeting Address.

In addition, the 2002 Leniency Notice has adopted a less demanding standard with respect to the information an applicant must provide to secure immunity – eliminating the 1996 Policy's requirement to "adduce *decisive* [written] evidence of the cartel's existence."[69] Under the 2002 Leniency Notice, the applicant must be the first to "submit evidence which in the Commission's view may enable" the Commission to proceed with a dawn raid or find an infringement of Article 81(1) of the EC Treaty.[70]

On May 1, 2004, Council Regulation 1/2003, the modernization of the EU's competition law, entered into force and gave national competition authorities and national courts a much larger role in enforcing European competition law.[71] While the Regulation addresses multiple aspects of EU competition law, including merger notification and review, there are two changes that relate to the EU's leniency program. First, the Regulation increases the ability of national competition authorities to exchange information received from leniency applicants, albeit with certain limitations on use.[72] Second, the Regulation removes the ability of national competition authorities to exercise jurisdiction over entities that are being investigated by the Commission, including leniency applicants.[73] As a result of this second change, applicants for leniency from the Commission are in a better position than they were prior to the enactment of the Regulation in the case of conduct that affected a number of EU states

2. Remaining Differences

Despite the notable changes and convergence reflected in the 2002 Leniency Notice, some differences remain between the EC, on the one hand, and the U.S. and Canada, on the other. These differences include the following:

- The U.S. and Canada permit an applicant to explore whether immunity is available without identifying itself. The 2002 Leniency Notice does not address anonymous inquiries, but the Commission staff has stated that the Commission declines to permit them.[74]

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69 1996 Leniency Notice ¶ B (emphasis added).

70 2002 Leniency Notice ¶ 8.

71 *See* Tom Reeves and Russell Hunter, *The modernisation of EC competition law – a procedural revolution,* THE EUROPEAN ANTITRUST REVIEW 2005 <http://www.globalcompetitionreview.com/ear/modernisation.cfm>.

72 *See* Stephen Blake and Dominik Schnichels, *Leniency following Modernisation: safeguarding Europe's leniency programmes,* EC COMPETITION POLICY NEWSLETTER 8 (Summer 2004).

73 *Id.*

74 *Compare* Arp & Swaak at 63 (raising the issue) *with* Bertus van Barlingen at 85 ("The short answer to this is 'no.'").

- The EC has also declined to adopt the U.S. and Canadian practices of allowing applicants to place first-in "markers," which they then later perfect.[75]

- Although it has reduced the evidentiary hurdle necessary to obtain immunity, the EC continues to incorporate an evidentiary standard in its leniency criteria. The U.S. DOJ, by contrast, simply requires accurate reporting of the violation and full, continuing and complete cooperation.[76]

- Although the Commission staff have indicated they will accept oral applications for leniency,[77] the viability of a "paperless" application process, common in the U.S. and Canada, has become subject to question based on the Commission staff's demand that they record oral presentations by counsel for leniency applicants and that the applicants later review and endorse the transcript of such presentations.

- The U.S. and Canada provide second-reporting applicants with fine reductions above 50 percent in appropriate cases.[78] The EC has declined to give itself that flexibility.

- The Antitrust Division has elected to be transparent with regard to the terms of its conditional amnesty letters and has made its model letter publicly available.[79] In response to an invitation to do the same, the Commission staff has declined.[80]

D. Enforcement and Leniency In Other Countries

Serious cartel enforcement activity around the world is growing, as more and more countries initiate or step up their enforcement efforts and create or strengthen leniency policies. A review of enforcement activities in some of the critical and/or increasingly active jurisdictions demonstrates that other jurisdictions around the world are largely adopting the U.S. leniency model.

1. The United Kingdom

In Europe, the United Kingdom has moved to the forefront of anti-cartel enforcement. It developed a corporate leniency policy modeled on the United States policy several years ago, and has introduced criminal sanctions and a related immunity policy for individuals involved in certain cartel activities.

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75 Bertus van Barlingen at 85.

76 DOJ Corporate Leniency Policy ¶¶ A(3) & B(4).

77 Bertus van Barlingen at 87.

78 *See, e.g., ABA Antitrust Comments*, at 6 (Sept. 2001) ("The experience of the members of the Sections is that the value added by the information provided by subsequent cooperators, particularly the second cooperator, is frequently worth more than a 50 percent reduction in the actual fine that otherwise would have been imposed.").

79 *See* Spratling, *Answers to Recurring Questions* (introducing and attaching Model Amnesty Letter).

80 *Compare* Arp & Swaak at 84 (proposing that the EC publish a model immunity agreement) *with* Bertus van Barlingen at 88 (declining "at least in this relatively early stage of application").

a) The U.K. Leniency Program

The United Kingdom introduced a corporate leniency program modeled on the U.S. policy in the Competition Act 1998, which took effect in March of 2000. 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. Immunity is automatic when the Office of Fair Trading ("OFT") has not yet begun an investigation and does not yet have sufficient information to establish the existence of the cartel. In a change from the U.S. policy, however, immunity is discretionary if the cartel member comes forward after the OFT has already begun an investigation, but before the Director General of the OFT has given written notice of his or her proposal to make a decision that the Chapter 1 prohibition against anticompetitive agreements has been infringed.[81]

In both instances, 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, and it must not have been the instigator or leader of or compelled another entity to participate in the cartel.[82]

The policy also provides for reductions in fines for entities who are not the first to come forward or who do not meet all of the conditions above.[83]

In addition, the U.K. has a "Leniency Plus" policy based on, and very similar to, the Amnesty Plus policy in the United States.[84] 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.[85]

Since the Competition Act 1998 went into effect in March of 2000, the OFT has granted some level of leniency to at least one party in at least 19 cases.[86] In the 2003-2004 fiscal year, the OFT received applications for leniency in 16 cases.[87]

b) Criminal Sanctions and Leniency Policy for Individuals

In the Enterprise Act 2002, the U.K. took its enforcement efforts one step further by creating criminal penalties for individuals who "dishonestly" engage in horizontal price-fixing, bid

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81 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") < http://www.oft.gov.uk>.

82 *Id.* § 3.4.

83 *Id.* § 3.8.

84 Id. §§ 3.10 – 3.11; *see also*, Margaret Bloom, *Key Challenges in Enforcing the Competition Act*, COMPETITION LAW JOURNAL (2003), at 86-87 (hereinafter "Bloom").

85 *OFT Penalty Guidance* §§ 3.10 – 3.11.

86 Bloom at 86.

87 Office of Fair Trading, *Annual Report and Resource Accounts 2003-04*, at 48.

rigging, market share agreements, and agreements to limit the production or supply of goods or services.[88] The new criminal offense is intended to be a companion to the civil penalties imposed on companies who violate the Competition Act's Chapter 1 prohibition on anticompetitive agreements, creating an enforcement scheme that provides penalties for both corporations and individuals who participate in cartel activities.

The Enterprise Act also created a related immunity, in the form of no-action letters, for individuals who have engaged in such conduct. This immunity is only available to an individual if the OFT believes that it does not already have, or is not in the process of gathering, sufficient information to successfully prosecute that individual.[89]

Individuals who come forward must meet virtually the same conditions as companies: they must admit their participation in the offense, provide the OFT with all information available to them regarding the existence and activities of the cartel, maintain full and continuous cooperation throughout the OFT's investigation and through the conclusion of any related criminal proceedings, not have coerced another company to take part in the cartel, and cease participation in the cartel at the time they disclose their activities to the OFT.[90] Once an individual applicant has met these criteria, the OFT will issue no-action letters that provide immunity from prosecution in England, Wales, and Northern Ireland.[91]

Some commentators assert that the new policy, as written and as explained by the OFT in the various guidance and consultation documents that it has issued, does not provide the same certainty or clarity as the policies in the U.S. and other jurisdictions.[92] The corporate and individual policies taken together, for example, still do not provide guaranteed immunity from prosecution for all cooperating directors and employees of a company that receives leniency under the Competition Act.[93] However, this portion of the Enterprise Act only took effect on June 20,

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88 Enterprise Act 2002 §§ 188-191 <http://www.hmso.gov.uk/acts/acts2002/20020040.htm>; *see also*, Office of Fair Trading, *The Cartel Offence, Guidance On The Issue Of No-Action Letters For Individuals* (April 2003) (hereinafter "OFT Guidance on No-Action Letters") <http://www.oft.gov.uk>. The OFT has stated that "dishonestly" is a concept that is "well-understood in criminal law," and refers to a test for dishonesty in the case of *R. v. Ghosh* [1982] 2 All E.R. 689.

89 Enterprise Act § 190; *see also, OFT Guidance on No-Action Letters*, at § 3.4.

90 *See OFT Guidance on No-Action Letters* § 3.3.

91 The same guaranty cannot be provided against prosecution in Scotland, but the Act provides that cooperation by individuals will be reported to the Lord Advocate in Scotland, who can then take such cooperation into account when determining whether or not to prosecute the individual. *OFT Guidance on No-Action Letters* § 3.2.

92 *See*, *e.g.*, Julian M. Joshua and Donald C. Klawiter, *The U.K. "Criminalization" Initiative: Step Forward or Another Complication?*, ANTITRUST 67 (Summer 2002); Julian M. Joshua, *The U.K.'s New Cartel Offence and Its Implications for EC Competition Law: A Tangled Web*, EUROPEAN L. REV., publication forthcoming; *but see*, Margaret Bloom, *A Significant Step Forward: The U.K. Criminalization Initiative*, ANTITRUST 59 (Fall 2002).

93 However, the OFT has indicated that it will normally provide no-action letters to employees, directors, ex-employees, and ex-directors of a company that receives 100 percent leniency from either the U.K. or

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2003, and the enforcement community has high hopes that the OFT will enforce the system in a way that complements enforcement efforts in the United States, the EU, and other jurisdictions.

c) Recent Enforcement Efforts

The OFT has imposed significant penalties on cartel participants since it revised the Enterprise Act, aided by the cooperation provided by leniency applicants.

In November 2004, the OFT imposed fines of over £2.4 million against the leading U.K. supplier of insulated glass desiccant and four of its distributors for price-fixing.[94] One of the parties received complete immunity, and therefore no fine, and two of the parties secured a reduction in their fines for cooperating under the leniency policy.[95]

In early August 2003, OFT announced that it had imposed fines of £18.6 million against ten companies for their role in several agreements to fix the prices of replica football (soccer) memorabilia.[96] Three of the corporations received full or partial leniency under the OFT's leniency policy; one of those companies, Sportestail Ltd., received full immunity after providing "crucial evidence" and meeting the conditions for full immunity.[97] In February 2003, the OFT imposed record fines of £22.65 million against toy manufacturers Argos and Littlewoods for fixing the prices of toys and games.[98] The OFT granted full leniency to a third competitor, Hasbro, acknowledging that it provided critical evidence that led to the initiation of the investigation.[99]

2. Australia

Like the U.K., Australia has also introduced a new leniency policy designed to detect and deter cartel activities, and has shown a strong commitment to pursuing cartel cases.[100] A committee convened by the Prime Minister of Australia has also recommended that the Trade Practices Act be revised to include criminal sanctions for hard-core cartel behavior.

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the EU, when the company seeking leniency either under the U.K. policy or the EU Notice has made an approach under the individual policy to the OFT on these individuals' behalf. *OFT Guidance on No-Action Letters* § 3.6.

94 *See* Press Release, Office of Fair Trading, *Fines for double glazing product price fixing* (Nov. 9, 2004).

95 *Id.*

96 *See* Press Release, Office of Fair Trading, *Large fines for replica football kit price-fixers* (Aug. 1, 2003).

97 *Id.*

98 *See* Press Release, Office of Fair Trading, *Record Fines For Toys Price Fixing* (Feb. 19, 2003).

99 *See* Press Release, Office of Fair Trading, *Record Fines For Toys Price Fixing* (Feb. 19, 2003).

100 For a discussion of the ACCC's activities in the cartel enforcement arena, *see* Jennifer McNeill, *Understanding prohibited cartel behaviour in order to minimise the risk of prosecution*, address before the Lexis Nexis Trade Practices Conference 2004 (Sept. 9, 2004) (hereinafter "Understanding prohibited cartel behaviour").

a) The Australian Leniency Policy

In June 2003, the Australian Competition & Consumer Commission ("ACCC") issued a leniency policy that is similar in many respects to, but as noted below, also different in several ways from, the U.S. policy.[101] 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.[102]

Like the U.S. policy, the Australian program provides for an offer of conditional leniency from ACCC-instituted court proceedings and penalties to the first company or individual to come forward when the ACCC is either unaware of the existence of a cartel or is aware of the cartel but has insufficient evidence to institute court proceedings. A grant of leniency to a corporation also applies to its officers, directors and employees.

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, continuously, 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,[103] not have been the clear lead of the cartel or coerced other corporations to participate, and, where possible, make restitution to injured parties."[104]

Subsequent parties or individuals that seek leniency from the ACCC are governed by a cooperation policy that pre-dates the new leniency policy.[105] 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.

The new policy appears to differ from the U.S. leniency policy in several key respects:

- Written applications. Unlike the United States and Canada, the Australian policy appears to require applicants to submit their applications for leniency in writing, via

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[101] *ACCC Leniency Policy For Cartel Conduct* (June 2003) (hereinafter "ACCC Leniency Policy") <http://www.accc.gov.au/fs-pubs.htm>.

[102] Press Release, Australian Competition and Consumer Commission, *ACCC Launches Leniency Policy to Expose Hard Core Cartels in Australia* (June 27, 2003) (hereinafter "ACCC Leniency Press Release").

[103] 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 Leniency Policy § 3.10.

[104] *Id*. § 2.1, Part A.2.

[105] Australian Competition and Consumer Commission, *ACCC Co-Operation Policy For Enforcement Matters* <http://accc.gov.au/pubs/publications/corporate/Coop_policy_July02.pdf>.

facsimile.[106] This is a striking difference from U.S. and Canadian practice, where for years enforcers and amnesty applicants have been perfecting a paperless process, and from the EU practice, which is moving in the direction of the U.S. and Canada. However, in practice, the ACCC has shown its willingness to accept paperless applications.

- Only one applicant per cartel. Unlike the U.S. policy, the Australian policy only provides one free pass per cartel – only the first entity in the door, corporation or individual, will receive full immunity from prosecution.[107] This is different from U.S. policy, which provides the opportunity for one corporation and one individual – an employee of a different company – to receive amnesty.

- Restitution versus civil damages. The policy requires applicants to make restitution to injured parties located in Australia, and specifically distinguishes this restitution from civil damages that may be sought by the same injured parties.[108] It is not clear yet whether the ACCC will allow, as the U.S. does, civil litigation damage awards (or civil litigation settlements) to satisfy the restitution requirement.

b) Criminal Sanctions

Currently, the Trade Practices Act creates only a civil enforcement scheme for antitrust violations. Change may be on the horizon, however. A committee convened by the Prime Minister of Australia to review the Trade Practices Act, informally known as the Dawson Committee, issued a report in early 2003 recommending that the TPA include criminal sanctions – fines for corporations and fines and imprisonment for individuals – for hard care cartel behavior.[109]

The Dawson Report also recommended that the maximum penalty for corporations involved in hard-core cartel activity be raised from $10 million (Australian), to the greater of $10 million or three times the gain from the violation, or, where the gain cannot be easily ascertained, 10 percent of the corporation's turnover.[110] A similar alternative fine provision (providing for two times the gain) has been used to tremendous success by the Antitrust Division in the United States,

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[106] The applications must contain the applicant's name, an outline of the conduct for which they are seeking leniency, information about the product, industry and market in question, the names of the parties involved, and details about when the conduct occurred.

[107] ACCC Leniency Policy § 3.5; *see also* ACCC Leniency Press Release.

[108] ACCC Leniency Policy § 3.12.

[109] *Review of the Competition Provisions of the Trade Practices Act* at 164 (Jan. 31, 2003) (hereinafter "Dawson Report") <http://tpareview.treasury.gov.au/content/report.asp>. The Report noted, however, that the Australian government needs to address certain issues before it introduces any criminal sanctions; in particular, it needs to develop a satisfactory definition of the hard-core behavior to be subject to criminal sanctions, and "a workable method of combining a clear and certain leniency policy with a criminal regime. *Id.* at 164. The Chairman of the ACCC, Graeme Samuel, has publicly supported the introduction of prison sentences for individual defendants as a deterrent to cartel behavior. *See* Cosima Marriner, *Jail Cartel Executives, Says ACCC*, SYDNEY MORNING HERALD (Nov. 12, 2003).

[110] *Id*. at 164-65.

accounting for the 39 fines greater than $10 million (U.S.) – including a fine of $500 million – discussed earlier in this paper.

The Dawson Report did not make any recommendations with respect to a leniency policy, but said that "[a] leniency or amnesty policy that provides clear and certain incentives to give evidence is a potent means of uncovering cartel behavior."[111] The leniency policy recently issued by the ACCC applies only to the existing civil regime, but the ACCC has indicated that it will reconsider the policy should Australia adopt the criminal penalties recommended by the Dawson Committee.[112]

A bill implementing changes proposed in the Dawson Report was pending in the Australian Parliament shortly before the recent elections in Australia were called.

c) Recent Enforcement Efforts

In an interesting recent matter, the ACCC secured a $1.5 million (Australian) penalty against George Weston Foods Limited for an attempted price-fix. Following an anonymous tipoff, the ACCC found that an executive at George Weston had called a competitor seeking to fix the wholesale prices of flour. Although the company was fined, the ACCC chose not to pursue any legal action against the executive. The fine reflected the fact that this was the fourth time since 1976 that George Weston Foods had engaged in price-fixing or attempted price fixing.[113]

In June 2004, the ACCC secured a $1 million (Australian) fine against Metro Brick and a $25,000 (Australian) fine against a manager at Metro Brick for fixing the prices of bricks. The ACCC was aided in its investigation by the cooperation of a leniency applicant, Metro Brick's co-conspirator Midland Brick.[114]

In early April 2004, the ACCC secured $14 million (Australian) in penalties against ABB Power Transmission Pty. Ltd. and ABB Transmission and Distribution Ltd., as well as almost $400,000 (Australian) in penalties against four executives of these companies, for their participation in price-fixing and market-sharing agreements in the domestic distribution transformer and power transformer markets. The ACCC has now secured over $35 million (Australian) in penalties against participants in this cartel, its largest penalties ever against a group of cartel participants. A total of nine individuals and six companies have been fined in connection with the cartel.[115]

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[111] *Id*. at 163.

[112] *See* ACCC Leniency Policy §3.2; *see also* ACCC Leniency Press Release.

[113] *See* Australian Competition and Consumer Commission, Press Release, *George Weston Foods penalised $1.5 million for attempted price fix* (Aug. 25, 2004).

[114] *See* Australian Competition and Consumer Commission, Press Release, *$1 million penalty for brick price-fix* (June 9, 2004).

[115] *See* Australian Competition and Consumer Commission, Press Release, *Australian Competition and Consumer Commission, ACCC Transformer Cartel bust: Record $35 million penalties* (Apr. 7, 2004).

[Footnote continued on next page]

3. Other Jurisdictions

As noted above, other countries around the world have also developed or are in the process of developing their own leniency policies, often in consultation with the U.S. Department of Justice, including Japan, South Africa, the Netherlands, Germany, Hungary, France, Ireland, the Czech Republic, Brazil, Norway, Poland, Switzerland, Cyprus, Belgium, Finland, Latvia, Lithuania, Luxembourg, Slovakia, Sweden and Korea.

These and other jurisdictions large and small are also stepping up their enforcement efforts, domestic and international. A sampling of recent enforcement actions around the world demonstrates the seriousness of this undertaking and the growing international scope of cartel enforcement.

Japan. The JFTC has increasingly become a significant presence in antitrust enforcement, and proposed changes to Japan's Antimonopoly Act, if passed, will likely further raise its profile as an important enforcement authority.[116]

In February 2003, the JFTC participated in coordinated raids with authorities from the U.S., Canada, and the EU against manufacturers of heat stabilizers suspected of fixing prices, the first such four-jurisdiction coordinated raid by antitrust enforcers. These joint efforts of the major enforcement jurisdictions are likely to continue, in light of the JFTC's announcement that it planned to establish a cooperation network focused on international cartels by signing a cooperation agreement with Canada that is similar to existing agreements with the U.S. and the EU.[117]

The JFTC has been particularly active in cracking down on domestic bid-rigging arrangements. In June of 2004, the JFTC ordered Toshiba and NEC Corp. to pay a total of 4.21 billion yen for rigging bids to the Japanese Postal Ministry for automatic letter sorting machines.[118] In July 2004, the JFTC fined Yokohama Rubber Co. and 11 other companies a total of 230 million yen for fixing prices in the anti-seismic rubber products market.[119] In October 2004, the JFTC

[Footnote continued from previous page]
The ACCC has indicated that the penalties imposed by the court were reduced significantly due to substantial cooperation by the parties.

[116] For interesting discussions of the changes in Japan's approach to competition law amid larger structural reforms in the Japanese economy, *see* Kazuhiko Takeshima, *Toward The New Design Of Competition Policy In Japan*, address before the American Bar Association Section of International Law and Practice and Section of Antitrust Law (Sept. 18, 2003) <http://www2.jftc.go.jp/e-page/speeches/takeshimaaba.pdf>, and Akinori Uesugi, *Enforcement Activities Against Cartels – What Is Going On In Japan?*, address before the American Bar Association's International Cartel Workshop (Feb. 5, 2004) <http://www2.jftc.go.jp/e-page/speeches/040205ABA.pdf> (hereinafter "Uesugi, Enforcement Activities").

[117] *See FTC To Join Anti-Cartel Force*, NIKKEI WEEKLY (Aug. 11, 2003).

[118] *See Japan Agency Fines Toshiba, NEC 4.21 Billion Yen for Bid Rigging*, KYODO NEWS INTERNATIONAL (June 16, 2004).

[119] *See Yokohama Rubber, 11 Others Fined for Price-Fixing*, JIJI PRESS TICKER SERVICE (July 6, 2004)

raided approximately 30 construction companies suspected of rigging bids for public works projects.[120]

At the end of December 2003, the JFTC proposed new amendments to the Antimonopoly Act that will enhance the JFTC's ability to detect and deter anticompetitive behavior in Japan. These proposed amendments would lead to the most significant revisions of the Antimonopoly Act since the late 1970's, and Secretary-General Akinori Uesugi of the JFTC has observed that they would "force very drastic changes in [Japanese] legal thinking as well as business behaviors."[121] The amendments contain several critical features: revisions to the surcharge system that would impose higher financial penalties, and higher penalties still on repeat offenders; an expansion of the types of conduct subject to the surcharge payment; a strengthening of the criminal components of the Antimonopoly Act; and, in yet another sign of increasing convergence in enforcement schemes, a proposal for the creation of an immunity or leniency program.[122] The new legislation continues to be the subject of much debate in Japan, and the JFTC has recently issued a new draft of the bill.[123]

Korea. In September 2003, the FTC fined nine steel manufacturers a total of 74.9 billion Won for colluding on prices for steel bars and for obstructing public procurement auctions for the supply of steel products.[124] In June 2004, the FTC fined 14 companies a total of 25.3 billion Won for price-fixing in the sale of apartments.[125] Also in June 2004, pursuant to the terms of its leniency program, the FTC gave a reward of 5 percent of the total penalties to an informant who provided information to the FTC regarding bid-rigging in the broadcast television sector.[126]

Czech Republic. The Czech Anti-Monopoly office has imposed record-breaking fines in the last year. In March 2004, the Anti-Monopoly Office issued what was then its second-largest fines, a total of 120 million CZK, against three bakeries accused of participating in a cartel agreement.[127] In June 2004, the Anti-Monopoly office imposed its largest-ever fines of 313

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[120] *See 30 Construction Companies Raided in Japan*, FORBES (Oct. 26, 2004).

[121] *See* Uesugi, *Enforcement Activities*, at 5.

[122] *See* Fair Trade Commission of Japan, *Outlines of the amendment of the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade* (Antimonopoly Act) (Dec. 24, 2003).

[123] The latest version of the proposed amendments is available at <http://www2.jftc.go.jp/e page/press/2004/october/041014.html>

[124] *See FTC Fines 9 Steel Makers for Collusion*, KOREA TIMES (Sept. 30, 2003).

[125] *See* Korea Fair Trade Commission, KFTC NEWS (July 2004), at 1-2.

[126] *Id*. at 1.

[127] *See Fines Levied By UOHS Reach Up To Tens Of Millions Of Crowns*, CZECH NEWS AGENCY (Mar. 29, 2004); *Three Largest Czech Bakeries Fined Millions By UOHS, Can Appeal*, CZECH NEWS AGENCY (Mar. 29, 2004).

million CZK against six fuel retailers for price-fixing.[128] In September 2004, the Anti-Monopoly Office fined three Czech mobile operators CZK 44 million for entering into cartel agreements to inflate prices artificially.[129]

Spain. In July 2004, Spain's three largest power companies, Endesa, Iberdrola and Union Fenosa, were fined nearly €1 million each for price-fixing and abusing market power.[130]

Russia. In August of 2004, the Chief of the Federal Antimonopoly Service in Russia proposed tougher penalties for cartel agreements, citing sharp price increases in chlorine and in the iron and steel industries.[131]

Singapore. On October 19, 2004, the Singapore Parliament passed a Competition Bill that provides for the creation of a Competition Commission and prohibits price-fixing, bid-rigging and other conduct, and also provides for a private right of action.[132]

Finland. In late March 2004, the Finnish Competition Authority proposed record fines of over € 97 million against a group of asphalt paving companies and the Finnish Asphalt Association, based on evidence that the companies were engaged in price-fixing, cooperation on bidding, and market allocation, and that the Finnish Asphalt Association engaged in a forbidden exchange of information.[133]

Hungary. From May 1 to October 1 of 2004, Hungary's Office of Economic Cooperation offered a temporary leniency policy to parties that reported evidence of cartel behavior occurring before May 1. The policy provided a series of reductions, from 30 percent to 100 percent, based on the nature of the evidence provided. The policy also included provisions for reductions of 30 to 50 percent for parties who admitted wrongdoing, even if they could not provide "particularly valuable" evidence.[134]

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[128] *See Antitrust Office Fines Six Fuel Retailers* KC313M, CZECH NEWS AGENCY (June 1, 2004).

[129] *See Three Czech Operators Fined for Cartel Agreements*, Wireless Europe (Sept. 20, 2004).

[130] *See Spanish Companies Fined 2.7M Euros for Price-Fixing*, FINANCIAL TIMES (abstracted from El Pais) (July 9, 2004).

[131] *See Antimonopoly Chief Calls For Tougher Cartel Penalties*, NEWS BULLETIN (Aug. 5, 2004).

[132] The Competition Act 2004 <http://www.parliament.gov.sg/Legislation/Htdocs/Bills/0400044.pdf>.

[133] *See* Finnish Competition Authority, Press Release, *FCA proposes heavy fines for members of asphalt cartel* (Mar. 31, 2004).

[134] *See Competition Office Offers Amnesty for Penitent Cartel*, HUNGARY BUSINESS REPORT (June 15, 2004).

In July 2004, the GVH levied its largest-ever fines of approximately € 28 million against five major construction companies for rigging bids in a 2002 government tender for the building of motorways.[135]

Norway. On May 1, 2004, Norway introduced its new Competition Act. The new act, in addition to providing the Competition Authority with new powers to issue administrative fines, introduces a leniency provision that allows for the reduction of criminal and administrative fines based on cooperation with the Competition Authority.[136]

Italy. In July 2004, the Italian Competition Authority imposed fines of € 40 million against 11 cement producers for their participation in a highly-structured arrangement to divide the market for ready-mixed concrete in Milan and neighboring provinces.[137]

V. The Rise of Civil Litigation

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.

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.

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[135] *See* Competition Office, Press Release, *Cartel of the motorway construction undertakings* (July 23, 2004).

[136] *See* Norwegian Competition Authority, Press Release, *New Competition Act Sanctioned* (Mar. 17, 2004).

[137] *See* Italian Competition Authority, Press Release, *The Competition Authority has fined a concrete market cartel EUR40 million* (August 9, 2004).

Settlement demands have also increased. Whereas in the 1970's and 1980's publicly reported settlements generally reflected a 2-4 percent overcharge for a four-year or shorter time period (consistent with the applicable four-year statute of limitations),[138] today double-digit percentage overcharge settlements are common (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,[139] has been repealed by legislative action permitting indirect purchaser lawsuits in state courts.

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[138] *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 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, *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).

[139] *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.

The most notable practical point about indirect purchaser actions is that usually they cannot be 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 – is dependent on the voluntary cooperation of the counsel and judges involved.

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.

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.[140]

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,[141] and civil litigation settlements – addressing the same 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).

As a result, the aggregate civil damages exposure faced by a defendant is subject to no limiting principle and arises from diverse lawsuits in varied jurisdictions applying 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. There are, of course, also costs and inefficiencies imposed on the judicial system and defendants (and thus, indirectly, on consumers)

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[140] *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* (January, 2001) (hereinafter "ABA Antitrust Report on Federal Antitrust Agencies") <http://www.abanet.org/antitrust/antitrustenforcement.pdf>.

[141] *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.").

which result from the multiplicity and diversity of lawsuits filed when news of a DOJ grand jury investigation or plea agreement leaks out.

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.[142]

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 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.[143]

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 policy and the unpredictable damage exposure arising from today's federal and state-by-state civil litigation situation are deterrents to cooperation with antitrust enforcers.

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. Some uncertainty still remains, however. In order to actually effectuate the reduction in damages, the amnesty applicant must cooperate with the civil plaintiffs by providing all of the relevant facts and documents and

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[142] As the 2001 American Bar Association Antitrust Section Task Force on the Federal Antitrust Agencies noted, multiple enforcers could issues 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).

[143] *See id.* at 23-24.

securing the cooperation of individual employees in depositions, interviews, and/or testimony. The trial court must then determine that the amnesty applicant has provided satisfactory cooperation. Such a requirement leaves an amnesty applicant somewhat at the mercy of plaintiffs' counsel, providing an element of subjectivity that at this time, before this provision has been tested, is not entirely reassuring. Nonetheless, the new legislation represents a concrete step toward the reform many believe to be needed.

C. 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 & A "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 interviews by government prosecutors.

In the EU, however, 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,"[144] and the EC required that evidence to be in documentary form.[145] 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 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.[146]

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[144] 1996 Leniency Notice ¶ B (emphasis added).

[145] *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.").

[146] 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 In re*

[Footnote continued on next page]

The potential discoverability of written materials submitted to the EC and other authorities in connection with leniency applications raises significant issues with respect to how enforcers like the EC proceed in the future. The EC's revised 2002 Leniency Notice does not directly address whether a written statement is required to secure immunity. This issue has been raised for potential clarification,[147] and the Commission staff's answer appears to be that they prefer written submissions and wish that U.S. courts would decline to treat them as discoverable.[148] Until and unless the U.S. courts do so, however, the EC will accept oral applications in cases where the applicant would face negative consequences in U.S. litigation from a written submission.[149] That said, in such cases the Commission will transcribe the oral presentation and require that the transcript be reviewed and certified by counsel for the applicant. The transcript will remain in the Commission's possession and, in its view, is an official Commission document and not a company document.[150]

Recently, the Commission issued a draft Notice which casts some doubt on its stated position regarding certification of the transcript of the oral presentation.[151] The draft, which addresses access by parties to the Commission's files in proceedings in which they are involved, indicates that notes of meetings with a party are not available for review unless the party in question has agreed to the minutes.[152] Although this statement is not directed at the paperless process and is therefore not dispositive on this point, it appears to confirm that the Commission has not firmly committed to the certified transcript approach. In practice, the Commission has not yet resolved the issue, and expects that leniency and immunity applicants will continue their cooperation while the issue of transcript certification is still pending.

While creative, the Commission's present oral presentation-plus-certified-transcript approach has raised a variety of concerns from counsel representing immunity applicants, because giving the company access to the transcript and requiring it to certify the transcript as accurate increases the chances that the document will be discoverable by private plaintiffs in the U.S. It also departs from the practice followed by the U.S. and Canada, which presently offer a "paperless" process so that companies that self-report do not find themselves in a worse position in follow-on civil litigation than the members of the cartel that provided less or no cooperation to the enforcement authorities. This remains an area in which further convergence would be highly desirable.

[Footnote continued from previous page]
Vitamins Antitrust Litig., No. 99-197 (TFH) (December 18, 2002) (Memorandum Opinion Re: Bioproducts' Rule 53 Objection).

147 *See* Arp & Swaak at 63-64.

148 Bertus van Barlingen at 85-87.

149 *Id.* at 87.

150 *Id.*

151 *See* Draft Commission Notice on the rules for access to the Commision file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54, and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (Oct. 21, 2004).

152 *See id*. at Section II.B.12.

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 pledged to cooperate in the DOJ's investigation and prosecution of the reported offense. Needless to say, Antitrust Division prosecutors generally would prefer 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.[153]

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.

D. Extra-Territorial Civil Exposure In U.S. And U.K. Courts

Recent decisions by courts in the U.S. and the U.K. have addressed whether there is jurisdiction for lawsuits asserting claims for cartel-related damages arising from wholly foreign sales and have reached different conclusions. While a recent U.S. decision appears to have largely foreclosed this type of litigation in the U.S., a decision in the U.K. may have opened the door to such lawsuits in that country.

In the U.S., the United States Supreme Court resolved a circuit split involving decisions interpreting the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a, and addressed the limits of subject matter jurisdiction in U.S. federal courts over claims involving foreign injury caused by foreign cartels.[154] In *F. Hoffman-La Roche Ltd. v. Empagran S. A.* ("*Empagran*"), 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 subject matter jurisdiction in the U.S. over such claims risked weakening enforcement by

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[153] *See generally* Niall E. Lynch, *Parallel Proceedings: The Government Perspective*, ABA Antitrust Section 51st Annual Spring Meeting Course Materials 455 (Apr. 3, 2003).

[154] *See F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (June 14, 2004).

expanding potential treble damage civil liability in the U.S. 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, one way or the other, an alternate theory of subject matter jurisdiction that seeks to impose liability if the foreign injury would not have occurred but for the domestic effect.[155] 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 connection there needs to be between the U.S. domestic effect and the foreign injury to give rise to a "claim." The lower courts that have addressed this issue have held that allegations or theories that simply rest on the existence of a purportedly global market or a worldwide conspiracy are insufficient to confer subject matter jurisdiction over claims alleging injury in foreign transactions.[156] As noted above, the U.S. is not the only country in which this issue is presented. The question of extra-territorial reach of laws providing for recovery of damages by cartel victims gained a new twist in May 2003, when the English High Court determined that claims for price-fixing damages against certain participants in the vitamins cartel could proceed to trial even though some of the plaintiffs and defendants were not domiciled in the U.K.[157] In the *Provimi* case, the English court determined, for example, that it had jurisdiction to try a price fixing claim by a German customer against a German supplier – opening the door to litigation of Europe-wide cartel-based cases in English courts even if the transaction at issue in the particular claim for damages occurred elsewhere in Europe between non-U.K. entities.

As a consequence of these developments in the U.K. and the U.S., the global civil litigation picture is somewhat uncertain. All else equal it would appear that, for example, if a German customer purchased a price-fixed product from a French supplier for delivery in Germany *and* the underlying cartel related to and directly affected competition for the same product in the U.K. and the U.S., recent court decisions may invite the German customer to consider bringing an action against the French supplier not in French or German courts but before English High Court in London. While jurisdiction for a claim of this nature in U.S. federal courts is inconsistent with both

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[155] 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. The District of Columbia Circuit held that the alternative claim was properly pleaded and preserved, and stated that it will order briefing on the merits. *Empagran v. F. Hoffman-Laroche, Ltd.,* 2004 WL 2434616 (D.C. Cir. Nov. 2, 2004).

[156] *Compare Sniado v. Bank Austria AG*, 378 F.3d 210 (2d Cir. 2004); (declining to find jurisdiction over conclusory allegations regarding a "global" market or "worldwide conspiracy") *and Den Norske Stats Oljieselskap AS v. Heeremac VOF*, 241 F.3d 420 (5th Cir. 2001) (claims relating to "a single, unified global market"), *with MM Global Servs., Inc. v. The Dow Chem. Co.*, 329 F. Supp. 2d 337 (D. Conn. 2004) (recognizing "but for" injury in a case in which plaintiffs made purchases in the U.S. and alleged a diminution in competition in the U.S. related to those products).

[157] *Provimi Ltd. v. Aventis Animal Nutrition S.A.,* 2003 EWHC 961 (COMM), High Court of Justice, Queens Bench Division (May 6, 2003).

the policy rationale behind the *Empagran* decision, and the lower court decisions applying *Empagran* to date, there are nevertheless now lawsuits pending in U.S. courts asserting precisely that sort of claim. Uncertainty and multiplicity of possible venues for lawsuits resulting in potentially redundant damage awards operates to reduce incentives to report cartel conduct under applicable leniency policies.

VI. A Paradigm For Counsel In International Cartel Matters

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 new paradigm for counsel in international cartel matters. The new rules of the road in cartel matters are reasonably simple to understand, but a daunting challenge to implement. Chief among them 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. That said, there is also a significant value in being second in the door, as opposed to third or fourth.[158] Regardless of whether amnesty is available or not, 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' and Canada'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.

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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[158] For an elaboration on this point, see Spratling, *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).

RULE NO. 2: IF YOU REPORT IN THE U.S., YOU LIKELY WILL HAVE TO PROMPTLY REPORT IN THE EU AND CANADA 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 candidate 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,[159] 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 competitor 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. They will likely move quickly to self-report in those jurisdictions in order to reap the remaining benefits for cooperation – and if you, in fact, have not reported in those jurisdictions, they will reap the full benefits of immunity or leniency, leaving you out in the cold. If the U.K. proves to be active in prosecuting cartels under the Enterprise Act, one may add the U.K. to the list of presumptive must-apply venues if there is relevant trade and conduct relating to that jurisdiction. If Australia adopts criminal sanctions and resolves the paperless process issue, one may also want to add Australia to that list as well.

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,

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[159] The U.S. will not (and neither 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* Spratling, *Corporate Leniency Policy Update*. *See also,* Alexander Schaub, *Co-operation in Competition Policy Enforcement Between the EU and the US and New Concepts Evolving at the World Trade Organization and the International Competition Network*, Address at the Mentor Group 13 (Apr. 4, 2002) <http://europa.eu.int/comm/competition/speeches/text/sp2002_013_en.pdf> ("[O]ur cooperation with the US authorities in [the cartel] area is a little more difficult than in the case of mergers, since there are legal impediments for us to exchange confidential information. This means, for instance, that information submitted to one side by a company under a leniency programme cannot be transmitted to the other side.")

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 they do not report, or wait to report.

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 DOJ amnesty program will in many cases inexorably lead to the disclosure of additional cartels or other hard-core per se violations: Amnesty Plus, Penalty Plus, and the omnibus question in connection with witness interviews.

1. Amnesty Plus

As described above, Amnesty Plus allows a cooperating party that has not obtained 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. 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 many consider and pursue. This is also true in Canada, which has a similar "immunity plus" policy.

Amnesty Plus drives the decision making of the 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, described above, builds on Amnesty Plus and increases incentives to report with respect to other improper collusion that may not implicate the amnesty applicant's co-conspirators in the immediate cartel.

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. Because of Penalty Plus, however, if the DOJ later learns of this separate conduct through the DOJ's own investigatory efforts or the amnesty application of another competitor, the amnesty applicant will suffer special, additional pain if it knowingly failed to turn in the separate 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.

As described above, 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 witness for whom English may be a second language).

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, but it may also be 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, and, therefore, did not seek amnesty) or even is 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 have awareness 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 on 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 above – but a company can lessen some of the difficulty encountered with civil litigation

by thinking ahead as the government investigation proceeds.[160] Thinking 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), and the combined effects of Amnesty Plus, Penalty Plus and the omnibus question (Rule 3), 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 and, even where it is possible to limit exposure, one does not know that 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 risks and opportunities for the company in multiple jurisdictions. Counsel must be prepared to act quickly, and then, in fact, act quickly. 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.**

2. **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 lawsuit? Are major customers likely to be receptive to settlement offers?

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[160] An example relates to submissions to the government. As discussed, civil litigation plaintiffs will seek to obtain relevant written submissions made to the government. They have been successful in connection with the vitamins litigation with respect to certain written communications with the EC and the Canadian Bureau of Competition. For defense counsel, it is thus important to pursue a "paperless" process wherever feasible.

- 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?

3. 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, while one can put down a "marker" and gain amnesty in the U.S. based on relatively limited information, the EC requires a more fulsome presentation of facts at the front end.

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 5 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.

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

This means that one 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.

VII. Trends & Challenges For The Future

A. Continued Convergence Among Jurisdictions Worldwide

The U.S., Canada, and the EU have made substantial progress in increasing the consistency in their leniency policies. The most critical step in this regard was the EC's 2002 Leniency Notice, which granted full immunity to the first reporting party and aligned its policy with that of the U.S. and Canada in many respects. This opened the flood gates for new applications in *all three* jurisdictions.

Convergence, however, has shown its limits, and 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 their respective policies. The International Competition Network and its new Cartel Working Group may be the right forum in which to do so.

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, encourages lawyers to be more formal, more abbreviated, and more lawyerly. The EC risks depriving itself of the detail and assistance that the U.S. and Canada regularly enjoy and which a more informal exchange with the Commission staff would facilitate.

- Establishing a procedure for proactive coordination between jurisdictions on fines and priority assignments for jail with respect to individual defendants.

- Adoption of a consistent policy on whether an immunity applicant "must reveal any and all offences in which it may have been involved" at the time of application. That requirement is unrealistic and deters, rather than encourages, immunity

applications. Instead, an Amnesty Plus-style policy is more practical and its pro-reporting impact on parties seeking leniency is well documented.

- Permitting hypothetical applications and anonymous inquiries with respect to whether immunity is available.

- 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, as is the procedure in the EC. A basic description of the collusion and a commitment to accurately report further details of the violation and cooperate with the government on a fulsome and continuing basis should suffice to secure conditional protection.

B. Increased Focus & International Cooperation With Respect To Interference With The Investigatory Process

A notable trend and issue for the future is the growth in prosecutions or amnesty withdrawals based on conduct that interferes with the Antitrust Division'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.[161] In the past two years, the DOJ revoked a conditional amnesty agreement for the first time, and has prosecuted companies who took steps to destroy documents, influence witnesses, or remove relevant documents from the U.S.

In March 2004, Stolt-Nielsen S.A., a Luxembourg company involved in the international parcel tanker shipping conspiracy, announced that the DOJ had revoked its acceptance into the conditional amnesty program.[162] This is the first time that the DOJ has revoked the amnesty of a company accepted into the program. While the DOJ cannot comment directly on the revocation, it did issue a statement indicating that amnesty applicants are expected to make accurate representations to the DOJ and that any applicant who does not, or who otherwise does not comply with the obligations of the conditional amnesty agreement, may be expelled from the leniency program.[163] In June 2003, the DOJ appeared to have revoked or denied the amnesty of a senior

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[161] *See, e.g.,* R. Hewitt Pate, *The DOJ International Antitrust Program – Maintaining Momentum,* address before the American Bar Association Section of Antitrust Law 2003 Forum on International Competition Law (Feb. 6, 2003) <http://www.usdoj.gov/atr/public/speeches/200736.htm> (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.").

[162] *See* Stolt-Nielsen S.A., Press Release, *Stolt-Nielsen S.A. Reports Withdrawal of Amnesty by Department of Justice* (Mar. 22, 2004) < http://www.stoltnielsen.com>.

[163] *See* U.S. Department of Justice, Antitrust Division, Press Release, *Justice Department Statement Regarding Antitrust Division's Corporate Leniency Program* (Mar. 22, 2004)

[Footnote continued on next page]

executive of Stolt-Nielsen, Richard Wingfield, when it charged him with one count of violating the Sherman Antitrust Act.[164]

Notably, the DOJ has also pursued foreign companies criminally 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 Menlo Park and to be sent to Tokyo while a grand jury investigation was active. 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 presently places on pursuing such matters, 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 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.[165]

The Canadian Competition Bureau has also charged Morgan Crucible with obstruction of justice.[166] The company's Canadian affiliate, Morganite Canada Corp., was charged for its role in implementing the underlying price-fixing conspiracy in Canada.[167]

[Footnote continued from previous page]
<http://www.usdoj.gov/atr/public/press_releases/2004/202940.htm>; *see also*, James Bandler and John R. Wilke, *U.S. Revokes Deal Offering Amnesty to Stolt-Nielsen*, WALL ST. J. (Mar. 23, 2004), at A3.

[164] *See, e.g.,* James Bandler, *Stolt-Nielsen Official Is Charged In Global Price-Fixing Inquiry,* WALL ST. J. (June 25, 2003), at A3.

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

[166] *See* Competition Bureau, Press Release, *Morgan companies fined $1 million for Obstruction and Price Fixing* (July 16, 2004).

[167] *Id.*

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."[168] 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.[169]

C. Increasing International Cooperation

As described above, the growth of leniency policies has been complemented by a marked growth in inter-agency coordination and assistance in recent years. Cooperation and coordination among enforcement agencies is a critical – perhaps one of the *most* critical – new frontiers in international enforcement. Scott Hammond, the Division's Director of Criminal Enforcement, has laid out the important role of cross-border cooperation:

> 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 as well as take advantage of a new one – Corporate Leniency Programs – and still that is not always enough. Antitrust enforcers must also work together. If antitrust enforcers are to beat cartels, we must share information in the investigation of hardcore cartels as law enforcers do in the investigation of other financial crimes.[170]

1. Assistance With Unilateral Investigations

Inter-agency cooperation has included cooperation from foreign authorities in the form of searches in Germany and Japan in aid of U.S. obstruction of justice investigations. One would assume that the DOJ would reciprocate in assisting their foreign counterparts in a similar manner if so requested.

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[168] 18 U.S.C. § 1519.

[169] Consistent with the new aggressiveness reflected in the Division's obstruction of justice prosecutions and the heightened maximum prison sentence under the Sarbanes-Oxley Act, the Division has expressed interest in exploring whether the maximum corporate fine for hard-core collusion, presently $10 million, and the statutory maximum jail sentence for individuals who participate in cartels, presently three years, should be increased. *See* R. Hewitt Pate, *Vigorous And Principled Antitrust Enforcement: Priorities And Goals*, Address Before The Antitrust Section of the American Bar Association (Aug. 12, 2003) <http://www.usdoj.gov/atr/public/speeches/200736.htm> (hereinafter "2003 ABA Address").

[170] Scott 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) <http://www.usdoj.gov/atr/public/speeches/201614.htm> (hereinafter "Beating Cartels At Their Own Game").

Similar assistance has occurred with respect to unilateral cartel investigations conducted by the U.S. For example, in one investigation, at the DOJ's request German authorities deployed over 100 German police officers to conduct multiple searches throughout Germany.[171]

The U.S. has also signaled its intent to extradite an individual from another country to face prosecution in the U.S., a tactic which has, until now, been available but never actually used in an antitrust proceeding. Recently, the DOJ revealed in a filing in a U.S. federal court filing that it was seeking to extradite Ian Norris, the former chief executive officer of Morgan Crucible PLC, from the United Kingdom.[172] As discussed earlier, Norris was indicted for his role in price-fixing in the carbon brush industry and in Morgan Crucible's subsequent obstruction of the DOJ's investigation. However, he has remained outside of the U.S. to avoid prosecution. If successful, this would be the first extradition of a foreign national for antitrust crimes anywhere in the world.

2. Coordinated International Investigations and Information-Sharing

One can also expect to see increasing levels of information-sharing among enforcement agencies. This is likely to mean more than just the sharing of leads or information, as countries share investigative strategies, offer wider access to people and evidence located within their borders, and coordinate their enforcement efforts.[173]

Notably, international enforcers increasingly have joined together in coordinated multi-jurisdictional investigations, including conducting surprise searches around the globe at the same time. Recent coordinated investigations have included the U.S., Canada, the EU, and Japan, as well as the EU and several of its member states.

The U.S. and Canada recently 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 procedures for making such requests.[174]

Various jurisdictions are also entering into information-sharing and related agreements in order to further their goals in the competition law arena. Norway, Denmark, Iceland, and Sweden are parties to a cooperation agreement that enables them to exchange confidential information

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

[172] *See* Government's Memorandum of Law in Support of Its Motion to Intervene and for a Limited Stay of Discovery at 2, *In re: Electrical Carbon Products Antitrust Litigation* (MDL No. 1514). An extradition treaty between the U.S. and the U.K. has been ratified by the U.K. and is awaiting ratification by the U.S. Senate.

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

[174] *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).

regarding cartels, mergers, and abuse of dominant positions.[175] The JFTC is in the process of completing or has completed cooperation agreements with the United States, Canada, and the European Union to allow information exchanges and broader cooperation on antitrust investigations.[176] The European Union recently entered into separate Memoranda of Understanding with Korea and China that will enable the parties to engage in dialogue designed to strengthen cooperation in the enforcement of their competition laws.[177] The EU has similar agreements with the U.S., Canada, and Japan. The fact that Japan and China have taken these steps, as much as anything, indicates 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.

D. Civil Litigation Issues

As discussed above, significant concerns have been raised with respect to the way the criminal and civil litigation systems in the U.S. remain disparate processes with nothing other than ad hoc, occasional coordination. Fines and civil damages amounts are not correlated. The Antitrust Division wastes time and effort intervening in civil cases to avoid compromising ongoing grand jury investigations. And, as counsel advising potential amnesty applicants know, the uncapped aggregate civil damages exposure faced by a defendant greatly complicates the assessment of incentives to report violations. The recent amendments to U.S. law which de-treble damages and remove joint and several liability for successful amnesty applicants should provide some measure of assurance to counsel and their clients on this front, but this should be the beginning, not the end, of reform.

VIII. Conclusion: The Future of International Cartel Enforcement

The past several years have seen greatly increased cartel enforcement, a trend that is guaranteed to continue. Counsel representing corporations and individuals must be prepared to meet the challenge of enforcement in multiple jurisdictions and multiple forums, at a time when important new developments are taking place on virtually a weekly basis. Several of these recent developments portend even greater international cartel enforcement and bear watching:

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[175] *See Agreement between Denmark, Iceland and Norway on co-operation in competition cases*, <http://80.232.29.234/internett/index.asp?LanguageCode=9>. Denmark, Norway and Iceland entered into the agreement in 2001, and Sweden joined on February 15, 2004.

[176] *See JFTC To Form Antitrust Network With United States, Canada, Europe*, ANTITRUST AND TRADE REG. DAILY (Aug. 8, 2003).

[177] *See* European Commission, Press Release, EU-China agree terms for bilateral competition dialogue (May 6, 2004); European Commission, Press Release, *EU and the Republic of Korea agree terms for bilateral competition dialogue* (Oct. 28, 2004).

- The continuing implementation of new competition laws and new, effective amnesty programs in jurisdictions worldwide means greater exposure, and also greater incentives to self-report.[178]

- Enforcement officials from every major jurisdiction report that their pipelines are full of investigations and imminent prosecutions of international cartels.

- The de-trebling of damages for amnesty applicants in the U.S. will likely provide greater incentives for self-reporting.

- Significantly increased cooperation and coordination among enforcement agencies increases the risk of detection, and reduces the number of safe enclaves in which cartel participants can escape prosecution.

As Assistant Attorney General Pate has pointed out, "There is now widespread agreement among countries around the globe on the serious harm caused by cartels, and the need for antitrust enforcement agencies to give their highest priority to rooting out and punishing this behavior."[179]

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[178] Scott Hammond, the Division's Director of Criminal Enforcement, has stated that "[u]questionably, leniency programs are the greatest investigative tool ever designed to fight cartels." Hammond, *Cornerstones*, at 1.

[179] *See* Pate, *Securing the Benefits*, at 5.