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Anti-Cartel Enforcement: An Advancing Global Tide

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The detection and prosecution of cartel conduct continues to be the acknowledged core mission of competition authorities across the globe. Amnesty programmes have played a growing and increasingly central role: they have fostered unprecedented convergence and multilateral cooperation in the pursuit of international cartels. The past year has seen the rising tide of cartel enforcement continuing to advance, notwithstanding isolated areas of challenge.

Most of the past year's developments are consistent with trends that have emerged with the proliferation of amnesty policies and increasingly coordinated global enforcement initiatives. Competition authorities continue to win substantial corporate fines in multiple jurisdictions. In the US, criminal sentences imposed on executives engaged in hard-core cartel activity have continued to ratchet upward. Especially significant, as a direct result of the 'amnesty plus' concept enforcers have been able to target cartel conduct in a succession of product lines within a single industry. All of these developments were fuelled by corporate self-reporting responsive to the incentives created by amnesty policies in an increasing number of jurisdictions.

Still, there were cross-currents amid the rising tide. In the US, the Department of Justice lost a criminal price-fixing case against a manufacturer of magazine printing paper. The case may be one in which the DoJ strayed from its own carefully plotted path in the consideration of amnesty applications and the crafting of criminal prosecutions. And across the Atlantic, what appears to have been a promising extradition theory for the US criminal enforcement programme suffered a potential setback.

There were also important developments in civil litigation against alleged price fixing. In *Bell Atlantic Corp v Twombly*,¹ the US Supreme Court held that civil antitrust plaintiffs must do more than accompany allegations of parallel conduct with a conclusory assertion of conspiracy. And, given recently filed motions in *In re Air Cargo Shipping Services Antitrust Litigation*, a US trial court appears headed for a ruling on the extent to which civil plaintiffs may assert claims involving foreign claimants and foreign transactions, under foreign law, in the federal courts of the US. These developments will interplay with governmental cartel enforcement initiatives both in the US and abroad.

Amnesty incentives drive major investigations

In the US, criminal antitrust enforcement continued to be the highest priority of the DoJ's Antitrust Division. For its fiscal year ending 30 September 2006, the Division filed 33 criminal cases and won fines totalling more than \$473 million. The DoJ-initiated worldwide investigation of dynamic random access memory (DRAM) manufacturers continued into the current fiscal year, and at last report had yielded total fines of more than \$730 million, along with prison sentences of unprecedented length against foreign nationals.

The DoJ's most recent successes involve its ongoing investigation of air cargo and passenger pricing practices. This investigation was launched in early 2006 when investigators in several jurisdictions around the world coordinated dawn raids and the execution of search warrants. The initial fruits of that investigation were announced on 1 August 2007 via a DoJ press release reporting that

British Airways and Korean Airlines had "each agreed to plead guilty and to pay separate \$300 million criminal fines for their roles in conspiracies to fix the prices of passenger and cargo flights."² Both companies have agreed to cooperate with the ongoing investigation. The \$600 million in fines reported in the first announcement of plea agreements in the airline investigation suggests that it may quickly come to rival the vitamins investigation as the largest ever in terms of worldwide penalties.

The DoJ press release also confirmed that the airline investigation was kicked off as the result of amnesty applications by two major carriers. Virgin Atlantic entered the amnesty programme "after reporting its participation with British Airways in the passenger fuel surcharge conspiracy". Similarly, Lufthansa secured amnesty "after it disclosed its role in the international cargo conspiracy in which British Airways and Korean Air were participants". Virgin and Lufthansa are undoubtedly cooperating with authorities elsewhere in the world, which renders it likely that the carriers implicated by them in the DoJ investigation will be negotiating settlements – and cooperating – with competition authorities in other jurisdictions as well.

This recent development underscores the central fact of cartel investigations in the modern era: in most major jurisdictions today – including without limitation the United States, Canada, the European Union and key member states, and a growing number of Pacific Rim countries – the incentives for self-reporting created by amnesty programmes are the single most powerful weapon in the enforcement arsenal. Amnesty applications spawned many of the significant international cartel investigations of recent years, and plainly were key in one of the latest and largest – the airline investigation.

Credit for the successes achieved in the prosecution of international cartels in recent years is due not only to the adoption of amnesty programmes by the authorities in major jurisdictions, but also to the increasingly sophisticated management of the settlement and cooperation process once an investigation has begun. In the DRAM investigations, for example, the DoJ – as well as enforcers in Europe and Canada – took advantage of a race for cooperation credit, so that being 'second in' carried with it benefits that became progressively less attractive if a company was 'third in', not to mention further down the line.

In this process, companies unable to secure amnesty and thus avoid entirely the payment of a corporate fine and the prosecution of individuals, may nevertheless secure discounts in the calculation of fines. In addition, companies closer to the front of the queue may secure relatively better treatment for their executives in terms of the number of 'carve-outs' and the sentences demanded of them in plea negotiations. Finally, even greater discounts are possible for companies able to qualify for 'amnesty plus', by cooperating not only in the pending investigation but also in the provision of information not yet known to enforcement authorities about conspiracies in other product lines.³

These patterns seem now to be well-established, and competition authorities around the world have become increasingly sophisticated in their utilisation of the process to obtain greater cooperation even as greater penalties are imposed, and to move across the vari-

ous product lines in an economic sector as the result of ‘amnesty plus’ incentives.

Higher stakes for executives

The US remains the sole jurisdiction in which culpable individuals face substantial risk of incarceration in international cartel investigations. Although some or all forms of cartel conduct have been criminalized in a few other jurisdictions, including the UK, Canada, Ireland, Israel and Japan,⁴ the US DoJ continues to stand almost alone in its consistent emphasis on the importance of prison terms for individuals as a deterrent to cartel conduct. Whatever may occur in other jurisdictions, trends in the prosecution of individuals in US investigations should be viewed with concern by executives everywhere.

Following enactment of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, the maximum jail sentence for criminal antitrust violations was increased from 3 to 10 years. The US Sentencing Commission adopted a new antitrust sentencing guideline on 1 November 2005, giving effect to the substantially greater maximum sentence.

On a related note, the Supreme Court’s 2005 decision in *United States v Booker*⁵ that the Federal Sentencing Guidelines could not be mandatory apparently has not had a substantial effect on federal sentences.⁶ If anything, the Guidelines’ influence was bolstered by the Supreme Court’s June 2007 decision in *Rita v United States*,⁷ which held it permissible under *Booker* for appellate courts to review district court sentences with a presumption that sentences within the Guidelines are reasonable. Several appellate courts have adopted such presumptions, and others are likely to join now that the Supreme Court has approved the practice.⁸ At the trial court level, appellate presumptions of reasonableness seem likely to encourage judges to impose sentences within the Guidelines despite their advisory character.

These developments were welcomed by the Antitrust Division, which has for years consistently advocated harsher sentencing in cartel cases. According to Antitrust Division statistics, the average sentence in criminal antitrust cases has increased in six of the past eight years, from an average of 10 months in fiscal year 2000 to an average of 27.3 months in the first half of fiscal year 2007. Over this same period the Division has prosecuted and imprisoned a steadily growing number of foreign nationals. As of spring 2007, 30 foreign executives from 10 different countries have served time in the United States for antitrust violations.⁹

The statistics confirm that the increase in average sentence length is the result of a deliberately pursued DoJ policy to seek longer sentences, which was strengthened (but not caused) by the statutory and Guidelines changes. Indeed, the DoJ’s steady refinement of the investigative settlement process, which as mentioned above creates a ‘race’ for benefits of cooperation, has played an important role in raising the stakes for individuals over time.

The DRAM cases illustrate the steadily increasing leverage DoJ enjoys through the course of an investigation. Although the returns are not complete, it appears that Infineon, the company that was ‘second in’ after the amnesty applicant, had the fewest individuals carved out and their sentences were in the range from four to six months.¹⁰ Hynix was ‘third in’, and its four carve-outs agreed to sentences from five to eight months.¹¹ Samsung followed, and its six individuals prosecuted on antitrust charges agreed to sentences that were higher still. Indeed, the sixth Samsung executive prosecuted agreed to serve 14 months in a US prison, a sentence DoJ described as “the longest imprisonment ever by a foreign defendant charged with price fixing in the United States.”¹² It is logical to expect that the Antitrust Division will seek to replicate the DRAM pattern in future investigations.

Another wild card for individuals – both foreign and domestic – is the DoJ’s continuation of its historic practice of bringing various fraud-related criminal charges either in tandem with, or in lieu of, the prosecution of antitrust offences. In some cases this can enhance potential sentences, while in others it simply provides an alternate or additional basis for prosecution. In all events, the Antitrust Division (often in cooperation with other federal prosecutors) has within the past year brought charges for mail fraud, false statements, conspiracy to commit commercial bribery, income tax evasion, false statements on tax returns, and obstruction of justice.¹³ Notably, one obstruction of justice charge resulted in a 33-month prison sentence against an attorney who tampered with documents and attempted to suborn perjury in the course of an Antitrust Division investigation.¹⁴

Finally, the DoJ confirmed its continued willingness to use surreptitious surveillance against companies and individuals implicated in collusion by cooperating witnesses. In the “marine hoses” matter, eight foreign executives were arrested and jailed on antitrust charges while attending business meetings in the United States.¹⁵ The arrests followed surveillance of cartel meetings and were coordinated with the execution of search warrants at various US offices and dawn raids by authorities of the Office of Fair Trading in the UK and the European Commission.

In sum, the DoJ’s steady pursuit of stiffer sentences, recent statutory and Guidelines penalty enhancements, and the determined application of an upward ratchet through the course of major investigations have come together to make the risk of longer sentences greater than ever.

The *Stora Enso* verdict

Amid the advancing tide of DoJ’s successes in cartel enforcement, one cross-current was the acquittal of *Stora Enso Oyj*, one of the world’s leading forest products companies, on charges that it conspired to fix the prices charged for magazine papers sold in the US over a 10-month period in 2002 and 2003.¹⁶ Although hardly cause for alarm within the corridors of the DoJ, the loss does point up two issues worthy of note.

First, the *Stora Enso* case underscores the risk of criminal prosecutions – in which the government bears the burden of proving its case beyond a reasonable doubt – when the case is one built on circumstantial evidence. This case did not appear to involve a classic, hard-core cartel of the sort whose characteristics have been described in a number of speeches by DoJ officials. There were no clear agreements memorialised by meeting minutes or witnessed by numerous participants. There were no charts or ‘score sheets’ tracking the conspirators’ compliance with a cartel agreement, or compensation schemes to discourage cheating. There were no exhortations about cover-ups or destruction of evidence, nor were there documents reflecting the creation of false ‘covers’ for competitor meetings or communications.¹⁷

Instead the case was built on a series of communications between two company presidents, in which they exchanged information about their companies’ decisions to follow another competitor’s price increase. The government’s key witness apparently characterised his discussions with his counterpart at *Stora Enso* as giving rise to an agreement or understanding. This was vigorously disputed by the *Stora Enso* participant. The jury was not persuaded beyond a reasonable doubt that an agreement or understanding was formed, and thus returned a verdict of not guilty.

Second, the result in *Stora Enso* serves as a reminder that a proffer technically sufficient for amnesty purposes may not constitute evidence that will support a jury conviction. This is always a challenge for the DoJ in circumstances where companies are counselled to hedge their bets by applying for amnesty on the basis of what may

turn out to be equivocal evidence. This was such a case inasmuch as the key testimony involved communications that could be characterised by participants in ways that would render them either legal or illegal, depending on whose characterisation was accepted by the finder of fact. A characterisation consistent with culpability, without more, may simply fall short of providing persuasive evidence of hard-core cartel conduct.

Facts of the *Stora Enso* variety may not be as problematic for enforcers in other jurisdictions, who proceed civilly and are not burdened with a reasonable doubt standard of proof. In the US, however, results will likely continue to be mixed to the extent that prosecutions are based on circumstantial evidence and conflicting characterisations of ambiguous communications.

Continued uncertainty over extradition

A possible appellate setback now faces the US DoJ in its attempt to extradite Ian Norris, a British national indicted for price fixing and for orchestrating a conspiracy to obstruct justice, tamper with witnesses and destroy documents. As discussed in last year's article, the case involves allegations of actions by Norris that occurred before price fixing became a crime in the UK. As a result, Norris has contended that he is not subject to extradition because 'dual criminality' – the requirement that the conduct be criminally punishable in both jurisdictions – is absent. The US has attempted to extradite Norris on the ground that the price-fixing conspiracy was tantamount to a criminal conspiracy to defraud, a common law crime in the UK.

Until this year, the US DoJ had prevailed at each stage of its attempt to extradite Norris. In June 2005, a British magistrates' court concluded that he could be extradited to the US. The British Home Secretary ordered Norris's extradition in September 2005, and the High Court of Justice dismissed Norris's appeals in January 2007. The US DoJ has proclaimed the Norris case an example of both the increasing helpfulness of the British government in international anti-cartel enforcement and the fact that "cartelists will not be allowed to hide behind borders."¹⁸

This message and the US case against Norris suffered a blow recently when the House of Lords agreed to hear Norris's appeal. Critics of the US-UK extradition agreement have long claimed that the agreement is one-sided, making it easier for the US to extradite people from Britain than vice versa, and that it deprives suspects of basic human rights by permitting extradition without the safeguard of a UK court ruling with respect to the evidence against the suspects. Members of the business community also claim that the ease of extradition effectively extends the extra-territorial application of American laws, posing great risks to those engaged in the global economy.¹⁹

A judgment for Norris would not only vindicate these concerns, but would affect future attempts to extradite defendants for antitrust offences, particularly in jurisdictions where the conduct is not clearly criminal. Other British businessmen suspected of price fixing in old cases are contended to be at risk of extradition if the Norris extradition is successful, encouraging the US DoJ.²⁰ On the other hand, if the extradition attempt is unsuccessful, the DoJ may be weakened in its attempt to obtain extradition from the numerous countries that have not criminalised price fixing or other antitrust violations.

Because extradition is available for other crimes – ones that are plainly criminal in both relevant jurisdictions – a defeat in the House of Lords could result in an increased focus by the US DoJ on such crimes.²¹ Although this might mitigate the effect of an inability to extradite foreign nationals for criminal antitrust charges, the US would nonetheless be undermined in its ability to ensure criminal enforcement of anti-cartel laws and to impose the severe punishments permitted under antitrust laws.

Civil cartel litigation developments

As mentioned in last year's article, civil antitrust risks affect the decisions of defendants to submit amnesty applications. The Second Circuit's decision in *Twombly v Bell Atlantic Corp* applied a low standard to a civil antitrust claim, raising concerns that private civil enforcement in cases with limited evidence could undermine overall enforcement. The Supreme Court's landmark decision in *Bell Atlantic Corp v Twombly*²² in May 2007 allays these concerns by heightening the standard a plaintiff must meet to survive a motion to dismiss in an antitrust case. Under *Twombly*, a civil antitrust plaintiff must present evidence sufficient to render a conspiracy plausible, rather than simply possible.²³

Civil antitrust claimants also continue to test the limits of federal jurisdiction even after the Supreme Court's 2004 decision in *Empagran*²⁴ appeared to limit the ability of plaintiffs claiming injury by international cartels in foreign markets to obtain relief in US courts. One case to watch in this regard is *In re Air Cargo Shipping Services Antitrust Litigation*,²⁵ in which plaintiffs purport to assert claims on behalf of various classes of foreign purchasers largely under foreign laws, including article 81(1) of the EC Treaty and article 53(1) of the EEA Agreement, asserting both supplemental jurisdiction under 28 USC, section 1367 as well as diversity jurisdiction under the Class Action Fairness Act. These and other issues will be decided initially on motions to dismiss currently in the briefing stage.

Conclusion

Cartel enforcement worldwide is more successful than ever. Enforcement authorities coordinate their strategies and utilize amnesty programs and the settlement process to generate self-reporting based on perceived benefits of cooperation. In the United States – and to a growing extent in Canada and other jurisdictions – civil litigation and possible criminal prosecution of individuals bring added difficulties for corporations and their executives.

* The assistance of Ashley E Johnson is gratefully acknowledged.

Notes

- 1 127 S Ct 1955 (2007).
- 2 DoJ press release (1 August 2007).
- 3 See, eg, remarks by Scott D Hammond, 'Measuring the Value of Second-In Cooperation in Corporate Plea Negotiating' (29 March 2006).
- 4 See generally Thomas O Barnett, 'Criminal Enforcement of Antitrust Laws: The U.S. Model', presentation at the Fordham Competition Law Institute's Annual Conference on International Antitrust Law and Policy (14 September 2006). For examples of non-US statutes, see UK Enterprise Act 2002, Ch 40, section 188 (Eng). Japanese Antimonopoly Act Articles 89-100; Canada Competition Act, RSC 1985 c C-34, section 4S.
- 5 125 S Ct 738 (2005).
- 6 The US Sentencing Commission in March 2006 reached this conclusion on the effect of *Booker*. US Sentencing Commission, 'Final Report on the Impact of *United States v. Booker* on Federal Sentencing' (2006).
- 7 127 S Ct 2456 (2007)
- 8 See 127 S Ct at 2462 (gathering cases).
- 9 See US DoJ, Antitrust Division Update (Spring 2007) available at <http://www.usdoj.gov/atr/public/222725.htm>.
- 10 DoJ press release (2 December 2004).
- 11 DoJ press release (19 April 2007).
- 12 Idem.
- 13 See, eg, DoJ press release (21 May 2007) (false statements on tax returns); DoJ press release (2 August 2006) (mail fraud); DoJ press release (20 July 2006) (false statements); DoJ press release

- (15 August 2006) (obstruction of justice); DoJ press release (29 September 2006) (conspiracy to commit commercial bribery, mail fraud, and to make false and fraudulent statements on tax returns; income tax evasion).
- 14 DoJ press release (15 August 2006).
 - 15 DoJ press release (2 May 2007).
 - 16 *United States v Stora Enso North America Corp*, No. 3:06 CR323(CFD) (D Conn, jury verdict 19 July 2007).
 - 17 See generally remarks by deputy assistant attorney general Scott D Hammond, 'Caught in the Act: Inside an International Cartel' (18 October 2005) and by assistant attorney general Thomas O Barnett, 'Seven Steps to Better Cartel Enforcement' (2 June 2006).
 - 18 Gerald F Masoudi, 'Cartel Enforcement in the United States (And Beyond),' presentation to the Cartel Conference, Budapest, Hungary (16 February 2007).
 - 19 Helen Power, 'It Feels Kafkaesque', *Sunday Telegraph* (5 August 2007), at p5.
 - 20 Helen Power, 'Ten Executives Face Long Arm of U.S. Justice,' *Sunday Telegraph* (27 May 2007), at p1.
 - 21 For example, the US DoJ recently extradited Michael L. Domecq from Spain to the US to stand charges for conspiring to commit tax fraud and to defraud Allied Domecq PLC. Domecq pled guilty and agreed to serve ten years in prison. DoJ Press Release, 'Former President of Domecq Importers Inc. Pleads Guilty to Conspiracy Charges' (26 June 2007).
 - 22 127 S Ct 1955 (2007).
 - 23 *Idem* at 1965-66.
 - 24 *F Hoffman-La Roche Ltd v Empagran SA*, 124 S Ct 2359 (2004).
 - 25 MDL No. 1775 (06-MD-1775) (EDNY).

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Mr Hartwell has served on the Council of the ABA section of antitrust law and the ABA task force on antitrust sentencing guidelines. He currently serves as a member of the international cartel task force and as chair of the section's compliance and ethics committee. He has chaired the antitrust sections of both the District of Columbia Bar and the Virginia State Bar. He sits on the editorial board of *The Antitrust Bulletin* and served as editor of the *ABA Handbook on Grand Jury Investigations* (2nd edition, 1988). He is listed in *The International Who's Who of Competition Lawyers*, *The Best Lawyers in America*, and the *Guide to the World's Leading Competition and Antitrust Lawyers*.

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