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Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE DISCUSSION ON RAISING AWARENESS OF THE HARM CAUSED BY CARTELS

-- United States --

The attached document is submitted by the delegation of the United States to Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item IV of the agenda at its forthcoming meeting on 12 October 2004.

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RAISING AWARENESS OF CARTELS IN THE UNITED STATES

1. This paper is divided into a background section on anti-cartel law and policy in the United States and two annexes consisting of some of the materials used by the U.S. Department of Justice Antitrust Division to increase awareness of cartels among public procurement officials, private corporate purchasing officials, corporate executives, and the private bar in the United States. The first annex is a Department of Justice antitrust primer for federal prosecutors on bid rigging. The second annex is status report on developments in the criminal enforcement program, which is updated periodically and provided to business executives and bar members in connection with speeches given by Division officials. Additional materials used by the Division to increase awareness of cartels in the United States, including the pamphlets *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For* and *Antitrust Enforcement and the Consumer*, may be found at http://www.usdoj.gov/atr/contact/newcase.htm. Speeches announcing and explaining Division policy with respect to the prosecution of cartels also may be found on the Division's website, http://www.usdoj.gov/atr.

Criminal Cartel Offenses In The United States

2. Criminal enforcement of the Sherman Act is the responsibility of the Antitrust Division of the Department of Justice. Violations of the Sherman Act are felonies punishable by a fine of up to $100 million for corporations, and a fine of up to $1 million or 10 years imprisonment (or both) for individuals. Alternatively, a defendant can be fined twice the gross pecuniary loss or gain resulting from the violation. Criminal prosecution by the DOJ is confined to unambiguously harmful, *per se* offenses, such as price fixing, bid rigging, and market division. The DOJ's experience is that prosecution, incarceration, and substantial fines are the most effective deterrents to antitrust crimes. In addition, private parties (including state and local governments) can recover three times the damages they suffer as a result of an antitrust violation, which also acts as a deterrent to such conduct in the U.S.

3. As *per se* offenses, bid rigging, price fixing, and market allocation are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm caused. Prosecution requires only the existence of an unlawful "contract, combination, or conspiracy" within the previous five years. No overt acts need to be proved, nor is an express agreement necessary. The offense can be established either by direct evidence from a participant or by circumstantial evidence.

Bid-rigging and Public Procurement

4. Prosecution of bid rigging related to procurement contracts in the U.S. occurs mostly in the context of public procurement, which is structured to ensure transparency and fairness, and typically uses a system of sealed bids. Private procurement in the U.S. is usually handled through private negotiation, and hard-core collusive agreements in this context often take the form of price fixing or market, customer, sales volume, or territorial allocation.

5. As noted, bid-rigging is a *per se* violation of Section 1 of the Sherman Act and, in addition, may also warrant prosecution for various other federal crimes, including mail or wire fraud; conspiracy to defraud the government with respect to claims; making false, fictitious or fraudulent claims; and making false statements to a government agency. U.S. Government procurement is regulated by the Competition in Contracting Act and the Federal Acquisition Regulation (FAR). The Act states that U.S. government procurement policy is to promote "full and open competition." The FAR includes important certification obligations on contractors, which have led to a number of procurement fraud prosecutions. Solicitations involving firm fixed-price contracts usually include a Certificate of Independent Price Determination

certifying that there were no consultations, communications, or agreements with competitors related to pricing or intent to submit an offer. Violations of this certification have lead to prosecutions for making false statements to the government.

6. In addition to criminal prosecutions, civil penalties up to treble damages under the False Claims Act are also very effective government enforcement weapons for bid-rigging violations on public contracts. The False Claims Act also provides for a private right known as a *qui tam* action which allows a private individual to sue in the name of the government for violations of the Act; the individual is entitled to a substantial share of the funds ultimately recovered (ranging from 15-30%) on behalf of the government, and whistle-blowers are protected against employer retaliation. Finally, another extremely serious sanction for bid rigging is suspension and debarment from other government contracts; under federal regulations, indictment for an antitrust offense is sufficient evidence for suspension, and a criminal conviction or civil judgment creates grounds for debarment.

Sentencing For Antitrust Violations

7. Sentencing for individuals and corporations convicted of a criminal antitrust offense occurs under guidelines established by the U.S. Sentencing Commission. The Commission has said that it, "believes that the most effective method to deter individuals from committing [antitrust crimes] is through imposing short prison sentences coupled with large fines." For convicted individuals, the range of fines is from one to five percent of the volume of commerce done by the defendant that was affected by the violation, but not less than $20,000; if the defendant cannot pay the fine, "equally burdensome" community service may be substituted. The Guidelines also state "the intent of the Commission that alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders." "Absent adjustments, the Guidelines require confinement of six months or longer in the great majority of cases that are prosecuted, including all bid-rigging cases." For corporate defendants, the minimum fine under the Guidelines is fifteen percent of the volume of commerce affected by the violation and it can range as high as 80% of the affected commerce.

Sources Of Information About Cartel Offenses

8. The DOJ obtains information about antitrust violations from a wide variety of sources. Disgruntled employees are a frequent source of information about cartel offenses. In addition, the Department conducts an active outreach program, with speeches to national associations of procurement officials and corporate executives to sensitize them to the indicia of cartel offenses and to the private antitrust bar to inform them of Division prosecutorial practices and policies. Furthermore, federal procurement regulations require executive agencies to notify the Attorney General about questionable bids or proposals, and contain an extensive list or practices and events that contracting personnel should consider suspicious. Finally, without a doubt the greatest source of recent international criminal investigations has been the Antitrust Division's 1993 Corporate Leniency Policy. Antitrust compliance programs can be very effective in detecting and deterring criminal antitrust violations, and often lead companies to seek amnesty under the Division's amnesty program.

ANNEX 1

1. The following discussion of bid rigging is reproduced from a 1994 DOJ publication entitled *An Antitrust Primer for Federal Prosecutors*:

2. Bid-rigging conspiracies usually fall into one or more of the following categories:

1. Bid Suppression

3. In "bid-suppression" or "bid-limiting" schemes, one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winner's bid will be accepted. Sometimes, one or more conspirators may file fabricated bid protests in order to try to deny an award to non-conspirators. After the bid is let, the winning bidder may pay off the co-conspirators through cash payments or subcontracts.

2. Complementary Bidding

4. "Complementary bidding" (also commonly called "protective" or "shadow" bidding) occurs when some competitors submit bids that are too high to be the winning bid or, if the bids are seemingly competitive in price, then they are unacceptable because of other non-price terms. Such bids are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine bidding. This enables the designated winning competitor's bid to be accepted when the agency requires a minimum number of bidders.

5. For example, in a bid-rigging conspiracy among sheet metal contractors in the Chicago area affecting public projects, as a job was put out for bid by public entities, the conspirators held meetings (at a restaurant) where the project was allocated to one of the conspirators and the bid prices were rigged.

6. Contractors attending the meeting who wanted the job brought cost estimates for the job. These estimates were discussed, the highest and lowest were thrown out, and the remaining numbers averaged to determine what the estimated cost of the designated winning contractor would be. Added to this cost was a figure ranging from 2 to 6 percent to cover bonding, insurance and a payoff to the ringleader of the conspiracy who allegedly used the money to pay off union and public officials to insure the success of the conspiracy.

7. Jobs were allocated either to those who were next in line to receive a job, or by a drawing if more than one contractor was eligible. At times, "silent partners" shared an allocated job. These co-conspirators shared in the proceeds of an allocated job with the chosen contractor, but their involvement in the job was unknown to the awarding authority. Also determined at the allocation meeting were the intentionally higher bids that the unsuccessful contractors turned in to insure the chosen contractor was the successful low bidder.

8. Finally, the conspirators kept records of the allocation meetings and used them to determine who was eligible for upcoming jobs.

3. Bid Rotation

9. In "bid rotation" schemes, all conspirators submit bids, but take turns being the winning low bidder. The terms of rotation may very; for example, competitors may take turns on contracts according to the size of the contract, trying to equalize the value of contracts won by each conspirator over time.

10. A strict rotating winning bid pattern defies the laws of chance and suggests collusion. In a case involving purchases of fresh fruits and vegetables for military commissaries and local school systems, an alert government purchasing agent detected a pattern of rotating awards among a select group of wholesale vendors. This evidence led to the investigation and successful prosecution of individuals, companies and a partnership for Sherman Act and mail fraud violations.

DETECTING PRICE FIXING, BID RIGGING AND MARKET ALLOCATION

A. CONDITIONS FAVORABLE TO COLLUSION

11. While price fixing, bid rigging and market allocation can occur in almost any industry, they are more likely to occur in some than in others. The milk, soft drink, steel drum manufacturing, highway, electrical and general construction, waste disposal, linen supply and dredging industries are examples of industries in which such conspiracies have been detected frequently. Investigators should be sensitive to the following industry conditions that increase the probability of collusion:

Collusion is more likely to occur if there are few sellers. The fewer the competitors, the easier it is to get together and agree on prices, bids, customers or territories. Collusion also may occur when the number of firms is fairly large, but there is only a small group of major buyers or sellers and the rest are "fringe" firms who control only a small fraction of the market.

The probability of collusion increases if other products cannot easily be substituted for the conspirators' product.

The more standardized a product or service is, the easier it is for competing firms to reach agreement on a common price structure. It is harder to agree on more subjective forms of competition, such as quality or service

12. As with most other types of criminal activity, once a conspiracy to rig bids starts it may not stop unless an investigation should occur. The Antitrust Division successfully prosecuted a 35-year conspiracy to rig bids for the sale of military gloves. The conspiracy ended only after grand jury subpoenas were issued.

B. CHECKLIST FOR POSSIBLE COLLUSION

1. Suspicious Behavior

13. Certain patterns of conduct suggest the possibility of collusion:

Some bids are much higher than published price lists, previous bids by the same firms or engineering cost estimates;

Fewer than normal competitors submit bids;

The same supplier has been the winning bidder on successive occasions over a period of time;

There is an inexplicably large dollar margin between the winning bid and all other bids;

There is an apparent pattern of low bids regularly recurring, such as company "X" always winning a bid in a certain geographic area for a particular service, or in a fixed rotation with other bidders;

A company appears to be bidding substantially higher on some bids than on some bids than on other bids, with no logical cost differences to account for the difference;

Two or more competitors have a "silent" joint venture even though at least one of them could have bid for the work alone;

A successful bidder repeatedly subcontracts work to competitors that submitted higher bids on the same projects;

There are irregularities (e.g., identical calculation errors) in the physical appearance of the proposals or in the method of their submission (e.g., use of identical forms or stationery), suggesting that competitors have copied, discussed or planned one another's bids or proposals. If the bids are obtained by mail, there are similarities of postmark or postal metering machine marks;

A bidder appears in person to present his bid and also submits the bid (or bond) of a competitor;

Competitors regularly socialize, hold meetings or otherwise get together in the vicinity or procurement offices shortly before bid filing deadlines;

Competitors meet as a group with procurement personnel to discuss or review terms of bid proposals (this may facilitate subtle exchanges of pricing information);

Bid prices appear to drop whenever a new or infrequent bidder submits a bid;

Competitors exchange price information among themselves. When this occurs in markets with only a few sellers, it is potentially anticompetitive. Such exchanges may take quite subtle forms, such as public discussions of the "right" price;

Firms that ship their product short distances to the buyer charge the same price as those that ship long distances. This may indicate price fixing, since otherwise the distant sellers would probably charge more for a given item to account for the extra cost of transportation;

Competitors are charging higher prices to local customers than to distant customers. This may indicate fixed prices in the local market.

2. Suspicious Statements

14. Sometimes statements made by marketing representatives of suppliers suggest that price fixing or bid rigging is occurring. Examples are:

References to "Association price schedule," "industry price schedules," "industry suggested prices," "industry wide" or "market wide" pricing;

Justification for the price or terms offered, "because they follow industry pricing or terms" or "follow (a named competitor's) pricing or terms";

References to "industry self-regulation" etc., such as justifications for price or terms "because they conform to the industry's guidelines" or "standards";

Statements indicating that the representative's company has been meeting with its competitors for whatever reason;

Statements that the representative's company "does not sell in that area" or that "only a particular firm sells in that area" or "deals with that business";

Statements to the effect that a competitor's salesman should not be making a particular proposal or should not be calling on a particular customer;

Statements to the effect that it is a particular vendor's "turn" to receive a particular job or contract.

15. Such patterns of behavior or statements do not always signal a prosecutable antitrust conspiracy. They do, however, warrant further inquiry.

ANNEX 2

AN OVERVIEW OF RECENT DEVELOPMENTS IN THE ANTITRUST DIVISION'S CRIMINAL ENFORCEMENT PROGRAM

1. Since the mid-1990's, the Antitrust Division of the U.S. Department of Justice ("Division") has employed a strategy of concentrating its enforcement resources on international cartels that victimize American businesses and consumers. This enforcement emphasis has led to remarkable success in terms of cracking international cartels, securing the convictions of major conspirators, and obtaining record-breaking fines. However, international convictions and high fines do not begin to tell the whole story. The last four years have seen a substantial increase in the average jail sentence and a string of consecutive record-breaking jail sentences, including one defendant sentenced to ten years imprisonment for his role in orchestrating a bid-rigging, bribery, and money-laundering scheme. A new high was also reached in FY 02 in terms of the total number of jail days imposed in Division cases -- more than 10,000. And in FY 03 the average jail sentence reached an all time high of 21 months. As outlined in the summary below, there is no question that the stakes have continued to rise for companies and their executives who engage in antitrust offenses – and they are only going to get higher.

INTERNATIONAL CARTEL ENFORCEMENT

Investigations

2. Currently, there are approximately 50 sitting grand juries investigating suspected international cartel activity. International cartel investigations account for more than a third of the Division's grand jury investigations. The subjects and targets of the Division's international investigations are located on 6 continents and in nearly 25 different countries. However, the geographic scope of the criminal activity is even broader than these numbers reflect. Our investigations have uncovered meetings of international cartels in well over 100 cities in more than 35 countries, including most of the Far East and nearly every country in Western Europe.

Cartels Prosecuted

3. Since the beginning of FY 1997, the Division has prosecuted international cartels affecting well over *$10 billion* in U.S. commerce. The Division has prosecuted international cartels operating in a number of sectors including vitamins, textiles, construction, food and feed additives, food preservatives, chemicals, graphite electrodes (used in steel making), fine arts auctions, ocean tanker shipping, and marine construction and marine transportation services. The cartel activity uncovered in these cases has cost U.S. businesses and consumers many hundreds of millions of dollars annually. For example:

- **Lysine** - Prices increased by 70% in the first 6 months; doubled over course of conspiracy; defendants agreed to pay U.S. customers more than $45 million in damages;

- **Citric Acid** - Prices increased by over 30% during duration of conspiracy;

- **Graphite Electrodes** - Prices increased by over 60% during duration of conspiracy;

- **Vitamins** - Defendants agreed to pay U.S. customers more than $1 billion in damages.

Fines Imposed

4. Of the over $2 billion dollars in criminal fines imposed in Division cases since FY 1997, well over 90 percent were obtained in connection with the prosecution of international cartel activity. The Division has obtained fines of $10 million or more against U.S., Dutch, German, Japanese, Belgian, Swiss, British, Luxembourgian, Norwegian, and Liechtenstein-based companies. In 37 of the 44 instances in which the Division has secured a fine of $10 million or greater, the corporate defendants were foreign-based. These numbers reflect the fact that the typical international cartel likely consists of a U.S. company and three or four of its competitors that are market leaders in Europe, Asia, and throughout the world. (See Attached Chart of Sherman Act Violations Yielding a Fine of $10 Million or More.)

Foreign Corporate Defendants

5. Since the beginning of FY 1998, roughly *50 percent* of corporate defendants in criminal cases brought by the Division were foreign-based. In FY 2001, the percentage of foreign-based firms charged by the Division rose to nearly 70 percent, and then returned to around 50 percent over the past three years.

PROSECUTION OF INDIVIDUALS

6. The Division has long supported the belief that the best and surest way to deter and punish cartel activity is to hold the most culpable individuals accountable by seeking jail sentences. For reasons that cannot be explored in this summary, that view has really begun to take hold.[1] Antitrust offenders are being sent to jail with increasing frequency and for longer periods of time.

Jail Sentences Have Increased

7. In FY 02, defendants in cases prosecuted by the Division were sentenced to a record number of jail days, more than 10,000 in all. In the last five years, over 100 years of imprisonment have been imposed on antitrust offenders, with more than 30 defendants receiving jail sentences of one year or longer. To put that last figure in perspective, more individuals have been sentenced in Division cases to one year or longer in the last five years, than in the previous twelve years. In FY 04 nine defendants were sentenced to serve more than a year in jail each, and the average jail sentence over the past five years was over 15 months. The majority of those sentences were imposed against U.S. business executives. However, as noted below, recent cases have resulted in the imprisonment of foreign executives as well.

Conviction Of Foreign Executives

8. The Division has prosecuted foreign executives from Belgium, Canada, France, Germany, Italy, Japan, Korea Mexico, Norway, the Netherlands, South Africa, Sweden, Switzerland, and the United Kingdom for engaging in cartel activity, resulting in heavy fines and, in some cases, imprisonment. Since

[1] For more information on Division policies and initiatives directed toward the prosecution of individual offenders, see, “Negotiating the Waters of International Cartel Prosecutions” speech by Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, before Thirteenth Annual National Institute On White Collar Crime (March 4, 1999); and “When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual’s Freedom?” speech by Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, before Fifteenth Annual National Institute On White Collar Crime (March 8, 2001). Division speeches can be found on our website at www.usdoj.gov/atr.

FY 2001, roughly one-third of the individual defendants in our cases have been foreign nationals. Foreign defendants from Canada, France, Germany, Sweden, and Switzerland have served prison sentences in U.S. jails for violating U.S. antitrust laws.

Tracking Down International Fugitives.

9. In 2001, the Division adopted a policy of placing indicted fugitives on a "Red Notice" list maintained by INTERPOL. A red notice watch is essentially an international "wanted" notice that, in many INTERPOL member nations, serves as a request that the subject be arrested, with a view toward extradition. Multiple fugitive defendants have already been apprehended through a Division INTERPOL red notice. The Division will seek to extradite any fugitive defendant apprehended through the INTERPOL red notice watch. The Division's use of red notices clearly raises the stakes for foreign executives who hope to avoid prosecution by simply remaining outside of the United States. With the stiffening resolve that foreign governments are taking toward punishing cartel activity and their increased willingness to assist the United States in prosecuting cartel activity, the safe harbors for antitrust offenders are rapidly shrinking.

INCREASED COOPERATION WITH FOREIGN ANTITRUST AUTHORITIES

10. Our ability to detect and prosecute international cartel activity has been enhanced by the increased cooperation and assistance that we have received from foreign governments, and from their own enforcement efforts. Cooperation among competition law enforcement authorities has undergone a sea change in the past five years. Over the past several years there has been a growing worldwide consensus that international cartel activity is pervasive and is victimizing businesses and consumers everywhere. This shared commitment to fighting international cartels has led to the establishment of cooperative relationships among competition law enforcement authorities around the world in order to more effectively investigate and prosecute international cartels.

International Anti-Cartel Enforcement Workshops

11. In the autumn of 1999, the Division hosted the first-ever international meeting of cartel investigators and prosecutors. Representatives from the competition law enforcement agencies of over 25 countries and the EU gathered in Washington for a two-day program devoted to the practical aspects of investigating and prosecuting international cartels. The event was such a success that the U.K.'s Office of Fair Trading hosted a similar conference in November 2000 in Brighton, England attended by representatives of 26 jurisdictions, the Canadian Bureau of Competition hosted the third workshop in November 2001, and the fourth International Cartels Workshop was hosted by the three Brazilian competition law enforcement agencies in Rio de Janeiro last September. A fifth workshop, hosted by the EC, was held in Brussels last year and in November the sixth international cartel workshop will be held in Sydney, Australia under the umbrella of the ICN. Perhaps even more important than the exchange of ideas and "best practices" at these meetings, the workshops have provided enforcers with the opportunity to develop close working relationships, which then serve as the basis for future formal and informal cooperation. This informal cooperation among competition law enforcers is best evidenced by a number of recent investigations in which dawn raids, searches, service of grand jury subpoenas, and drop-in interviews were coordinated to occur simultaneously in multiple jurisdictions.

Assistance In Obtaining Foreign-Located Evidence

12. The improved cooperation with foreign law enforcement authorities already has provided us with increased access to foreign-located evidence and witnesses that has proven to be instrumental in the cracking of a number of international cartels. While I am constrained as to what I can reveal about the

nature of this assistance, I will offer one example that I am at liberty to discuss and one compelling statistic to demonstrate the breadth of this cooperation. The example -- our investigation of bid-rigging on wastewater treatment plant construction contracts in Egypt, which were funded by USAID, was assisted by the execution of search warrants by foreign authorities on the Division's behalf to seize evidence abroad. In that investigation, over 100 German police officers assisted in the simultaneous execution of search warrants on multiple companies at several locations across Germany. The searches induced cooperation from subjects of the investigation, which previously had been lacking, and that was critical to the success of the cases we later brought. The statistic -- in the past few years, foreign authorities from five different countries have executed search warrants at our request in more than a half-dozen of our international cartel investigations. This is a remarkable advancement in international cooperation.

Cooperation And Coordination Of Investigations

13. Our cooperation with foreign antitrust authorities has never been better or more effective. In February of last year, four enforcement authorities, the Antitrust Division, the EC Directorate-General for Competition, the Canadian Competition Bureau, and the Japanese Fair Trade Commission, coordinated searches and drop-in interviews in an unprecedented level of cooperation. This represented the first time that an international cartel investigation had gone overt simultaneously in four jurisdictions. As noted in the EC's press release, inspectors from the EC and Member States searched 14 companies located in six Member States as a part of these parallel efforts. Overall, more than 250 investigators and agents were involved in the simultaneous launching of these investigations. Such coordination among multiple jurisdictions will occur more frequently and be a part of the next frontier of cartel investigations. Due to the recent changes in the EC's leniency policy, we have seen more simultaneous amnesty applications, which have resulted in more opportunities for multi-jurisdictional cooperation. It is no longer uncommon for international antitrust authorities to discuss investigative strategies and to coordinate searches, service of subpoenas, drop-in interviews, and the timing of charges in order to avoid the premature disclosure of an investigation and the possible destruction of evidence. Such cooperation will lead to more effective antitrust enforcement in the future and the detection, prosecution, and elimination of more cartels.

Adoption Of Legislation And Agreements To Foster Cooperation

14. Another example of governments' increased willingness to assist each other in the enforcement of anti-cartel laws can be seen in the May 2001 agreement between the U.K. and U.S. governments to remove a "side letter" to the U.K.-U.S. Mutual Legal Assistance Treaty ("MLAT"), which had excluded antitrust matters from the scope of the cooperation provisions of the MLAT. The types of assistance in antitrust matters that the U.K. can now provide to the Division include the use of the U.K. courts to take testimony from witnesses, obtain documents, and assist in the collection of criminal fines. In addition, the U.K. government recently adopted legislation that creates a new criminal offense for individuals who engage in hardcore cartel activity and provides for maximum jail sentences of up to five years for antitrust offenders. The criminalization of cartel offenses in the U.K. and the passage of the U.K. Extradition Act of 2003 may also make it possible in the near future to extradite individuals involved in cartels from the U.K. to face antitrust charges in the United States. In addition, in the past few years, the Division has entered antitrust cooperation agreements with four foreign governments -- Brazil, Israel, Japan, and Mexico. These new agreements complement agreements previously reached with Australia, Canada, the European Union, and Germany, and will foster cooperation between the U.S. and those governments with respect to the investigation and prosecution of international cartels and other aspects of antitrust enforcement. In November 1999, the Division's International Antitrust Enforcement Assistance Agreement with Australia became effective. This agreement is a comprehensive antitrust mutual legal assistance agreement, which allows the two countries to exchange evidence and assist each other's civil and criminal antitrust investigative efforts. The exchange of evidence between antitrust enforcement authorities certainly will increase in the years to come. In 1998 the OECD encouraged member countries to "co-operate with each

other in enforcing their laws against [hard core] cartels" and the OECD's Competition Law and Policy Committee's Working Party 3 currently is considering a set of recommended practices to govern the formal exchange of evidence between competition law enforcement authorities. The adoption of recommended practices by the OECD will assist member countries to remove obstacles to effective co-operation in the enforcement of laws against hard-core cartels (including the adoption of national legislation and/or entering bilateral agreements) and will result in increased exchanges of evidence between competition law enforcement authorities.

Increased Foreign Enforcement

15. Of course, antitrust authorities in Asia, Canada, Europe, and around the world are not merely assisting our investigations. They also have become increasingly aggressive in investigating and sanctioning cartels that victimize their consumers. Seemingly with each passing day, the antitrust community learns of a foreign government that has enacted a new antitrust law, created a new cartel investigative unit, obtained a record antitrust fine, or developed a new Corporate Leniency program. In addition, foreign competition law enforcement agencies are imposing increasingly stiff penalties for hardcore cartel conduct. Some recent fines imposed by the EC make the point. Recently the EC imposed fines against: (1) the seven members of the specialty graphites cartel totaling almost 61 million euro; (2) the three members of the nucleotides cartel totaling over 20 million euro; and (3) the eight members of the Italian concrete reinforcing bar cartel totaling 85 million euro. Other recent developments in foreign enforcement include record-breaking fines imposed against members of the vitamin cartel in Australia, and the first-time imposition of jail sentences for antitrust offenders in Israel. This heightened, worldwide commitment to investigating and severely sanctioning international cartels surely is shrinking the safe harbors for cartel activity.

CRIMINAL FINES

16. Since the beginning of FY 1997, the Division has obtained over $2 billion dollars in criminal fines. This total includes forty-six corporate fines of $10 million or more, seven fines of $100 million or more, and one fine of $500 million -- the largest criminal fine ever imposed in the United States under any criminal statute.

Corporate Fines Have Increased Dramatically

17. International cartels affect massive volumes of commerce. In some matters currently under investigation, the volume of commerce affected by the suspected conspiracy is over $1 billion per year and in roughly two-thirds of our international investigations, the volume of commerce affected is over $100 million over the term of the conspiracy. Because international cartels affect such a large volume of U.S. commerce and the U.S. Sentencing Guidelines fines are based in large part on the amount of commerce affected by the cartel, fines obtained by the Division have increased dramatically since FY 97.

- **Year-End Total Fines**. In the 10 years prior to FY 1997, the Division obtained, on average, $29 million in criminal fines annually. In FY 1997, the Division collected $205 million in criminal fines - - which was 500 percent higher than during any previous year in the Division's history. In FY 1998, the Division obtained over $265 million in criminal fines. In FY 1999, the Division secured over $1.1 billion. In FYs 2000-2003, fines obtained exceeded $150 million, $280 million, $75 million, and $107 million respectively. The fines obtained by the Division in FY 04, which just ended on September 30, 2004, totaled approximately $350 million

- **Higher Top-End Fines**. Ten years ago the largest corporate fine ever imposed for a single Sherman Act count was $5 million. However, today fines of $10 million or more have now been

imposed against 46 corporate defendants and one individual defendant. The Division has obtained fines of $100 million or more in seven cases:

– **$500 million** against F. Hoffmann-La Roche (vitamin cartel - May 1999), largest fine ever imposed in a criminal prosecution of any kind;

– **$225 million** against BASF AG (vitamin cartel - May 1999);

– **$160 million** – against Infineon Technologies AG for conspiring to fix the prices of dynamic random access memory (DRAM) chips, the most commonly used semiconductor memory product, providing high-speed storage and retrieval of electronic information for a wide variety of computer, telecommunications, and consumer electronic products (September 2004);

– **$135 million** against SGL Carbon AG (graphite electrodes cartel - May 1999);

– **$134 million** against Mitsubishi Corp. (graphite electrodes cartel - May 2001);

– **$110 million** against UCAR International (graphite electrodes cartel - April 1998); and

– **$100 million** against Archer Daniels Midland Company (lysine and citric acid cartels - October 1996).

CORPORATE LENIENCY PROGRAM

18. In August 1993, the Division revised its Corporate Leniency Program to make it easier and more attractive for companies to come forward and cooperate with the Division.[2] Three major revisions were made to the program: (1) amnesty is automatic if there is no pre-existing investigation; (2) amnesty may still be available even if cooperation begins after the investigation is underway; and (3) all officers, directors, and employees who cooperate are protected from criminal prosecution.[3] As a result of these changes, the Leniency Program is the Division's most effective generator of international cartel cases, and it is the Department's most successful leniency program. Moreover, it has served as a model for similar corporate leniency programs that have been adopted by antitrust authorities around the world.

Application Rate

19. The revised Corporate Leniency Program has resulted in a surge in amnesty applications. Under the old policy, the Division obtained roughly one amnesty application per year. Under the new policy, the application rate has jumped to more than one per month. As a result of this increased interest, the Division

[2] Antitrust Division, U.S. Department Of Justice, Corporate Leniency Policy (1993), *available at* http://www.usdoj.gov/atr/public/guidelines/lencorp.htm

[3] For more information on the requirements and application of the Division's Amnesty Program, see, "The Corporate Leniency Policy: Answers To Recurring Questions," speech by Gary R. Spratling, before ABA Antitrust Section 1998 Spring Meeting (April 1, 1998); "Making Companies An Offer They Shouldn't Refuse," speech by Gary R. Spratling, before Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust (February 16, 1999); "Lessons Common To Detecting And Deterring Criminal Activity," speech by Scott D. Hammond, before 3rd Nordic Competition Policy Conference (September 12, 2000); and "When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?" speech by Scott D. Hammond, before Fifteenth Annual National Institute On White Collar Crime (March 8, 2001).

frequently encounters situations where a company approaches the government within days, and in some cases less than one business day, after one of its co-conspirators has secured its position as first in line for amnesty. Of course, only the first company to qualify receives amnesty.

Case Generator

20. Since FY 1997, cooperation from amnesty applications has resulted in scores of convictions and over $1.5 billion in criminal fines. In fact, the majority of the Division's major international investigations have been advanced through the cooperation of an amnesty applicant.

Foreign Authorities Following The U.S. Model

21. The extraordinary success of the Division's leniency program has generated widespread interest around the world. We have advised a number of foreign governments in drafting and implementing effective leniency programs in their jurisdictions. As a result, countries such as Australia, Brazil, Canada, the Czech Republic, France, Germany, Ireland, Korea, and the United Kingdom have announced new or revised leniency programs, with still other countries in the process of following. Most significant was the European Union's recent adoption of a revised leniency program in February 2002. The new program establishes a far more transparent and predictable policy than its predecessor and brings the EC's program closely in line with the Division's Corporate Leniency Policy. In fact, in greatly reducing the amount of discretion involved in assessing amnesty applications and in creating the opportunity for companies to qualify for full immunity after an investigation has begun, the blockbuster revisions are similar to the ones made by the Division when we successfully expanded our program in August 1993. The convergence in leniency programs has made it much easier and far more attractive for companies to simultaneously seek and obtain leniency in the United States, Europe, Canada, and in other jurisdictions where the applicants have exposure.

Amnesty Rewards

22. The vitamin, graphite electrodes, fine arts auctions, and USAID construction investigations offer four prime examples of the stunning incentives and rewards to companies *and their executives* that take advantage of the Amnesty Program. In each of these matters, the amnesty applicant paid *zero* dollars in criminal fines, and its cooperating executives received nonprosecution protection.

- **Vitamins**. In the vitamin investigation, the amnesty applicant's cooperation directly led to F. Hoffmann-La Roche's (HLR) and BASF AG's decision to plead guilty and pay fines of $500 million and $225 million, respectively. Six Swiss and German executives from HLR and BASF were convicted for their role in the reported conspiracy, and all served time in U.S. prisons.

- **Graphite Electrodes**. In the graphite electrodes investigation, the second company in the door after the amnesty applicant paid a $32.5 million fine, the third company in paid a $110 million fine, and a fourth company pled guilty and paid a $135 million fine. Mitsubishi was later convicted at trial for its role as an aider and abettor of the cartel and was sentenced to pay a $134 million fine. Two U.S. executives were sentenced to lengthy prison terms and paid over $2 million in fines, and a German executive was fined $10 million.

- **Fine Arts Auctions**. The amnesty applicant's cooperation directly resulted in Sotheby's decision to plead guilty and pay a $45 million fine. Sotheby's former Chairman, Alfred Taubmann, was subsequently convicted at trial and sentenced to one year in jail and a $7.5 million fine.

- **USAID Construction**. The assistance of an amnesty applicant led to the conviction of four companies who engaged in a scheme to rig bids on water treatment construction contracts funded abroad by the United States Agency for International Development (USAID). To date, fines totaling more than $140 million have been imposed in addition to over $10 million in restitution to the U.S. government. A U.S. executive for one of the late pleading companies was convicted at trial and sentenced to three years imprisonment.

Amnesty Plus

23. Currently, there are roughly 50 sitting grand juries investigating suspected international cartel activity. Nearly half of these investigations were initiated by evidence obtained as a result of an investigation of a completely separate industry. For example, a new investigation results when a company approaches the Division to negotiate a plea agreement in a current investigation and then seeks to obtain more lenient treatment by offering to disclose the existence of a second, unrelated conspiracy. Under these circumstances, companies that choose to self-report and cooperate in a second matter can obtain what is referred to as "Amnesty Plus." In such a case, the company will receive amnesty, pay zero dollars in fines for its participation in the second offense, and none of its officers, directors, and employees who cooperate will be prosecuted criminally in connection with that offense. Plus, the company will receive a substantial additional discount by the Division in calculating an appropriate fine for its participation in the first conspiracy.

Penalty Plus

24. Companies that elect not to take advantage of the Amnesty Plus opportunity risk potentially harsh consequences. If a company participated in a second antitrust offense and does not report it, and the conduct is later discovered and successfully prosecuted, where appropriate, the Division will urge the sentencing court to consider the company's and any culpable executives' failure to report the conduct voluntarily as an aggravating sentencing factor. We will request that the court impose a term and conditions of probation for the company pursuant to U.S.S.G. §8D1.1, and we will pursue a fine or jail sentence at or above the upper end of the Guidelines range. Moreover, where multiple convictions occur, a company's or individual's Guidelines calculations may be increased based on the prior criminal history. In one recent "penalty plus case," the Division asked the court to depart upward from the top of the guidelines range pursuant to U.S.S.G. § 5K2.0 due to the company's recidivism as an antitrust offender, and to impose a sentence that was almost 30% above the guideline. In that case, the VOC was $17 million and the company paid a fine of $12 million – 70% of the VOC. Furthermore, three of the executives were "carved out" of the plea agreement. If the company had reported the conduct when it had the chance in connection with the earlier prosecution, it would have paid zero fine and its executives, who now are subject to prosecution, would have been given full nonprosecution protection. For a company, the failure to self-report under the Amnesty Plus program could mean the difference between a potential fine as high as 80 percent or more of the volume of affected commerce versus no fine at all on the Amnesty Plus product. For the individual, it could mean the difference between a lengthy jail sentence and avoiding jail altogether.

Confidentiality Policy

25. The Division's policy is to treat as confidential the identity of amnesty applicants and any information obtained from the applicant. The Division will not disclose an amnesty applicant's identity, absent prior disclosure by or agreement with the applicant, unless authorized by court order. Further, in order to protect the integrity of the Amnesty Program, the Division has adopted a policy of not disclosing to foreign authorities, pursuant to cooperation agreements, information obtained from an amnesty applicant unless the amnesty applicant agrees first to the disclosure. Notwithstanding this policy, the Division

frequently obtains waivers to share information with another jurisdiction in cases where the applicant has also sought and obtained leniency from that jurisdiction. Such waivers are helpful in ensuring that the Division is able to coordinate investigative steps with the other jurisdictions involved. In addition, amnesty applicants may issue press releases or, in the case of publicly traded companies, submit public filings announcing their conditional acceptance into the corporate amnesty program thereby obviating the need to maintain their anonymity.

RECENT LEGISLATIVE AMENDANTS

26. On June 22, 2004 President Bush signed into law H.R. 1086, which includes the Antitrust Criminal Penalty Enhancement and Reform Act of 2004. The Act increases the maximum Sherman Act corporate fine to $100 million, the maximum individual fine to $1 million, and the maximum Sherman Act jail term to 10 years. The Act also enhances the incentive for corporations to self report illegal conduct by limiting the damages recoverable from a corporate amnesty applicant, that also cooperates with private plaintiffs in their damage actions against remaining cartel members, to the damages actually inflicted by the amnesty applicant's conduct.

27. The increase in criminal penalties will bring antitrust penalties in line with those for other white-collar crimes and will ensure the penalties more accurately reflect the enormous harm inflicted by cartels in today's marketplace. In addition, the detrebling provision of the Act removes a major disincentive for amnesty applications and hence, will lead to the exposure of more cartels, making the Division's Corporate Leniency Program even more effective in detecting and prosecuting cartels. The detrebling amendment applies to a corporation and its executives, who cooperate with the government investigation through the Antitrust Division's Corporate Leniency Policy. The amendment limits the liability of a successful leniency applicant and its executives to single damages without joint and several liability -- i.e., the applicant would only be liable for actual, compensatory damages attributable to the harm its own conduct caused. In return, the bill requires the applicant and its executives to provide full cooperation to the victims in their lawsuit against the other conspirators for treble damages. Because all other conspirator firms remain jointly and severally liability for treble damages caused by the conspiracy, the victims' potential total recovery is not reduced by this legislation. Therefore, the amendment likely will (1) increase the number of criminal antitrust conspiracies that are exposed and prosecuted; (2) increase compensation to victims of criminal antitrust conspiracies through the required cooperation provided to the victims by the amnesty applicant; (3) further de-stabilize, and deter the formation of, criminal antitrust conspiracies by creating an additional major incentive to self-report the violation; (4) reduce the costs of investigating and prosecuting criminal antitrust conspiracies; and (5) reduce the cost for victims to recover the damages they suffer from criminal antitrust conspiracies.